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2610
No. 12403

United States
Court of Appeals

For the Ninth Circuit.

WILLIAM J. DUBIL, EDWARD J. HUBIK and
EARL F. SHORES,

Appellants.

vs.

RAYFORD CAMP & CO., and RAYFORD CAMP,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 12403

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	64
Amended Reply to Plaintiffs William J. Dubil and Edward J. Hubik to Counterclaim of Defendants	38
Answer to Amended Complaint and Counter- claim of Defendants Rayford Camp & Com- pany and Rayford Camp	48
Answer to Counterclaim of Defendants Rayford Camp & Company and Rayford Camp	17
Appeal:	
Certificate of Clerk (DC)	191
Certificate of Clerk to Supplemental Tran- script (DC)	193
Designation of Contents of Record on	156
Designation of Record Material to the Con- sideration of the Points to be Relied Upon on	198
Notice of	155
Statement of Points to be Relied Upon on	195

INDEX	PAGE
Bill of Complaint-Infringement of U. S. Letters Patent No. 2,052,221	2
Certificate of Clerk (DC)	191
Certificate of Clerk (DC) to Supplemental Transcript	193
Complaint for Infringement of U. S. Letters Patent No. 2,052,221	158
Defendants' Answers to Plaintiffs' Interroga- tories	83
Defendants' Interrogatories under Rule 33 ...	29
Defendants' Objections to Plaintiffs' Interroga- tories to William H. Sloan	92
Designation of Contents of Record on Appeal	156
Exhibits (Defendants):	
"T" Findings of Fact and Conclusions of Law	168
"U" Report of Special Master	170
Exhibits (Plaintiffs):	
No. 16 Certificate from Secretary of State (California)	183
No. 17 and No. 22 Photostat of Wrapping Chip Steaks	184
No. 18 and No. 20 Photostat of Wrapping Chip Steaks	185

INDEX

PAGE

Exhibits (Plaintiffs')—(Continued):

No. 19 and No. 21 Photostat of Wrapping Chip Steaks	187
Copy of U. S. Letters Patent No. 2,052,221	181
No. 27 Final Decree	189
Final Decree	166
Findings of Fact and Conclusions of Law	129
Judgment	147
Memorandum of Defendants with Respect to Plaintiffs' Affidavit	126
Motion to Dismiss the Second Count of Plain- tiffs' Complaint for Lack of Jurisdiction..	8
Motion to Inspect	77
Motion to Strike	72
Names and Addresses of Attorneys	1
Notice of Appeal.....	155
Notice Under 35 U.S.C. 69	28
Opinion	99
Order re Inspection of Plants	79
Petition by the Plaintiffs	106
Petition to Fix Amount of Supersedeas Bond	152
Petition to Stay Execution of Judgment	150
Plaintiffs' Answers to Certain of Defendants' Interrogatories	45

INDEX	PAGE
Plaintiffs' Answers to Defendants' Interrogatories V (A) etc.	60
Plaintiffs' Interrogatories Under Rule 33	36
Plaintiffs' Motion to Strike Part of Complaint	17
Plaintiffs' Objections to Defendants' Interrogatories	41
Plaintiffs' Points and Authorities re Defendants' Motion to Dismiss the Second Count	9
Statement of Points to be Relied Upon on Appeal	195
Stipulation re Amended Reply of Plaintiffs ...	75
Stipulation to Extend Time to File Record on Appeal and to Docket the Appeal	157
Stipulation re Filing Amended Complaint	63
Stipulation re Filing Amended Reply	37
Stipulation re Photostatic or Photographic Copies	75

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In the United States District Court, Southern
District of California, Central Division

In Equity No. 8649-Y

WILLIAM J. DUBIL, EDWARD J. HUBIK, and
EARL F. SHORES,

Plaintiffs,

vs.

RAYFORD CAMP & CO., RAYFORD CAMP,
JOHN DOE, JANE DOE, and JOHN DOE
CO.,

Defendants.

BILL OF COMPLAINT—INFRINGEMENT OF
UNITED STATES LETTERS PATENT No.
2,052,221

The plaintiffs complaining of the herein named
defendants allege:

I.

That the plaintiff William J. Dubil, a resident of
Turlock, County of Stanislaus, State of California,
is the inventor of the Method of Preparing Fresh
Meat covered by U. S. Patent No. 2,052,221, here-
inafter referred to as the patent in suit, and the
said Dubil is the owner of an undivided one-half
($\frac{1}{2}$) interest in and to the entire right, title and in-
terest of the patent in suit. That the plaintiff Ed-
ward J. Hubik, a resident of North Long Beach,
County of Los Angeles, State of California, is the
owner of the other undivided one-half ($\frac{1}{2}$) interest
in and to the patent in suit, as shown by an instru-

ment of assignment duly recorded in the United States Patent Office prior to the issuance of said patent and as shown upon the face of said patent.

II.

That on August 25, 1936, United States Letters Patent No. 2,052,221 were duly and legally issued to the plaintiffs Dubil and Hubik for an invention in Method of Preparing Fresh Meat; and since that date plaintiffs Dubil and Hubik have been and still are the owners of the said Letters Patent.

III.

That the plaintiff Earl F. Shores, a resident of Los Angeles, County of Los Angeles, State of California, who is and has been doing business under the fictitious firm name of Chip Steak Company of Los Angeles, California, has the exclusive right to practice the method covered by said patent, throughout the County of Los Angeles, State of California, except the cities of Long Beach and Pomona, and except that territory which is bounded on the north by Slauson Avenue, on the south by Century Boulevard, on the west by Santa Fe Boulevard, and on the east by Atlantic Boulevard, the latter bounded territory lying wholly within the cities of Huntington Park and South Gate, in the County of Los Angeles, State of California. The County of Los Angeles, in the State of California (with the foregoing exceptions), is hereinafter referred to as said territory.

IV.

That, upon information and belief, the above-

named defendants are citizens of California, and residents of the County of Los Angeles, State of California, and are carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co., that the true names of the defendants John Doe, Jane Doe and John Doe Co., are unknown to the plaintiffs at this time, but leave of court is requested to substitute their true names when ascertained by the plaintiffs.

V.

This Honorable Court has jurisdiction of the cause of action herein, as the same is a suit in equity arising under the patent laws of the United States. [3*]

VI.

That the defendants have been and are infringing said Letters Patent in said territory by preparing, selling and using slices of fresh meat, prepared in accordance with the patented invention, and will continue to do so unless enjoined by this Court.

VII.

That the plaintiffs have placed the required statutory notice on sheets of paper separating slices of fresh meat prepared and sold by them under the patent in suit, and have given written notice to the defendants of their said infringement.

For a Second, Further and Additional Cause of Action Against the Defendants, the Plaintiffs Allege:

* Page numbering appearing at bottom of page of original certified Transcript of Record.

VIII.

That the plaintiff Hubik originally adopted and used the trade-mark "Chip Steak" and registered same in the office of the Secretary of the State of California, at Sacramento, California, on September 14, 1936, Registration No. 20515, and ever since such date notice of registration thereof has appeared on the labels used successively by the plaintiffs Hubik and Shores, and each of them. That the label used by the plaintiff Shores since approximately May, 1938, in connection with the sale in said territory of thinly sliced fresh meat, has consisted of waxed paper sheets bearing the trade-mark "Chip Steaks," with the trade-mark "Chip Steaks" appearing on said labels in a curve or arch adjacent a prominent and central picture of the head of a beef animal. That plaintiff Shores has continuously since the latter date used said label in said territory by placing same between series of slices of thinly sliced meat produced in accordance with the patent in suit and sold by the plaintiff Shores in said territory. That the plaintiff Shores has continuously used said trade-mark and label in said territory since approximately May, 1938, which trade-mark and label have come to be associated with the [4] plaintiff Shores, in the mind of the public.

IX.

That the defendants are and have been for some time using in said territory, in connection with the sale of thinly sliced fresh meat, a label simu-

lating the label of the plaintiff Shores, that defendants' label contains the words "Camp Steak" arranged in a curve or arch adjacent the picture of the head of a beef animal, with the picture of the head of the animal arranged prominently and centrally of the label. That the defendants, and each of them, use said label in the advertising of defendants' thinly sliced fresh meat by placing such labels, printed on waxed paper, between series of said slices of fresh meat in the same manner as plaintiff Shores does and has done for many years. That the thinly sliced meat of the plaintiffs and defendants, sold under said labels, is indistinguishable at the time same is offered to the public. That the use of such label of the defendants in said territory in connection with the sale of thinly sliced fresh meat is calculated to and will deceive the public into believing that they are buying the thinly sliced fresh meat of the plaintiff Shores when they are in fact buying the thinly sliced fresh meat of the defendants, whereby irreparable injury is being done the plaintiffs, and each of them, by the actions of the defendants, and each of them, herein complained of.

X.

That the plaintiffs have given the defendants due notice of the infringement upon plaintiff's said trade-mark and of defendants' unfair competition in the manner of displaying, advertising and using its mark herein complained of, but the defendants neglected and refused, continue to neglect and re-

fuse to cease any of said acts complained of, and will continue to do so unless restrained by this court. The plaintiffs have no speedy or adequate remedy at law. [5]

Wherefore, plaintiffs demand (a) preliminary and final injunctions against further infringement upon said patent and trade-mark and against further unfair competition by the defendants and those controlled by the defendants, (b) defendants' profits, (c) general damages not less than a reasonable royalty, and (d) an assessment of costs against the defendants.

/s/ C. G. STRATTON,

Attorney for Plaintiffs. [6]

State of California,

County of Los Angeles—ss.

Earl F. Shores, being by me first duly sworn, deposes and says: that he is one of the Plaintiffs in the above-entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ EARL F. SHORES.

Subscribed and sworn to before me this 15th day of September, 1948.

[Seal] /s/ VESTA NELSON,

Notary Public in and for said County and State of California.

[Endorsed]: Filed September 16, 1948. [8]

[Title of District Court and Cause.]

MOTION TO DISMISS THE SECOND COUNT
OF PLAINTIFFS' COMPLAINT FOR
LACK OF JURISDICTION

Now Come the defendants Rayford Camp & Co. and Rayford Camp in the above entitled cause and move this Honorable Court for an order dismissing the second count of plaintiffs' Complaint herein for lack of jurisdiction of this Court.

In support of this motion the above defendants will rely on the Memorandum of Points and Authorities annexed hereto and the pleadings and proceedings heretofore had herein.

Dated: At Los Angeles, California, this 21st day of October, 1948.

HARRIS, KIECH, FOSTER &
HARRIS.

FORD HARRIS, JR.,
WARREN L. KERN.

By /s/ FORD HARRIS, JR.,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 21, 1948. [9]

At a stated term, to wit: The September Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Di-

vision of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of November, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For hearing motion of defendants filed Oct. 21, 1949, to dismiss second count of complaint; C. G. Stratton, Esq., appearing as counsel for plaintiffs; W. L. Kern, Esq., appearing as counsel for defendants;

Plaintiffs points and authorities re defendants' motion are filed, and plaintiffs' motion to strike part of complaint is filed.

Attorneys Kern and Stratton argue. Court orders said motions denied, defendant to have 10 days to answer. [20]

[Title of District Court and Cause.]

PLAINTIFFS' POINTS AND AUTHORITIES
RE DEFENDANTS' MOTION TO DISMISS
THE SECOND COUNT

Now Come the plaintiffs in the above-entitled cause and move the Honorable Court for an order denying the defendants' motion to dismiss the second count of the plaintiffs' complaint.

I.

This response is directed to the defendants' motion to dismiss the second count of the plaintiffs' complaint for lack of jurisdiction. It is the plaintiffs' contention that this Court does not lack jurisdiction over the cause of action alleged.

It is admitted by the defendants that original jurisdiction of this Court over the matter pleaded is conferred under the Patent laws of the United States. As will be shown, this Court may retain derivative jurisdiction of the element of unfair competition as it is a ground in support of the cause of action.

II.

The case of *Hurn v. Oursler*, 289 U. S. 238, 77 L.Ed. 1148 (1933), relied upon heavily by the defendants, appears detrimental to their contention. Therein was alleged the existence of two versions of a play, only one of which was copyrighted under Federal law. The complaint alleged (1) Copyright infringement, (2) Unfair competition with the copyrighted version, and (3) Unfair competition with the uncopyrighted version.

The Supreme Court had original jurisdiction over the copyright infringement and retained derivative jurisdiction over the related unfair competition. However, since there did not exist the requisite original jurisdiction for the uncopyrighted version, a dismissal as to that part was ordered.

The present cause of action for patent infringement is comparable to the sustained federal jurisdiction in the *Hurn* case with respect to the copy-

righted version of the play, the uncopyrighted version being immaterial to the present cause. The allegation of infringement of the patent confers the federal court with jurisdiction and the element of unfair competition follows by way of derivative jurisdiction.

III.

The case of *Lewis v. Vendome Bags, Inc.* 108 Fed. (2d) 16, (C.C.A. 2, 1939) (Cert. denied 309 U. S. 660, 84 L.Ed. 1008, 1940) also relied upon by the defendants rendered its interpretation of the Hurn rule. Said Judge Swan at page 17:

“ . . . It held that the federal question raised by the charge of copyright infringement gave the district court jurisdiction of the case; that rejection of the federal claim on the merits did not deprive the court of jurisdiction to decide the claim of unfair competition in respect to the copyrighted play, and that this claim should also have been dismissed on the merits; . . . ”

IV.

The case of *Edelmann & Co. v. Triple-A Specialty Co.* 88 Fed. (2d) 852 (C.C.A. 7, 1937), (Cert. denied 300 U. S. 680, 81 L.Ed. 884, 1937) involved issue as to infringement of a patent and whether damages for unfair competition in violation of a common-law right could also be rendered in the same action. Said Judge Lindley at page 854:

“ . . . Here appellee might have sought relief from unfair competition in the state court, but it could not there obtain relief declaring the patent

invalid or not infringed. Under *Hurn v. Oursler*, 289 U. S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, the court was endowed with jurisdiction also to determine the issues as to fair competition.”

V.

The element of unfair competition arises not merely because of the palming off by the defendants of their goods for that of the plaintiffs but basically stems from the unlawful use by the defendants of the patented process of the plaintiffs. Were it not for such unlawful use, the defendants would not be apt to be successful in marketing their product, for it would lack the application of the patented process.

Activities resulting in unfair competition are not necessarily confined to display and sale of the product to the public but entails numerous consecutive acts from the inception to fulfillment of the unlawful purpose. One such act is the appropriation by the defendants of the process patented by the plaintiffs.

The decision rendered in the case of *Musher Foundation v. Alba Trading Co.*, 127 Fed. (2d) 9, (C.C.A. 2, 1942) as cited by the defendants, purports to be based upon the doctrine of the *Hurn* case. The majority of the court interpreted the *Hurn* doctrine as applicable to the particular facts and utilized the rule in a narrow and technical sense. The natural implication of the *Hurn* case was avoided. The dissent rendered by Judge Clark in the *Musher* case is more coextensive with a proper

interpretation of the doctrine, for the repudiation of the "second circuit rule" by the Hurn case liberalized the concept of federal jurisdiction in accordance with policies of equitable jurisprudence. Said Judge Clark at page 11:

"... Be that as it may, the Hurn doctrine seems to me logical and vastly saving of unnecessary duplication of litigation. If the roast must be reversed exclusively for the federal bench, it is anomalous to send the gravy across the street to the state court house. Of course, there was left a certain indefiniteness, even ambiguity, as to the outer reaches of the doctrine and the extent of a single cause of action, but perhaps not more than occurs in any judicial drawing of boundary lines. See my remarks in *Lewis v. Vendome Bags, Inc.*, supra, 108 F. 2d at pages 19, 20. At any rate, it has been reiterated by a unanimous court in *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, supra; and we should do our best to follow it."

The fundamental basis of the present cause of action is a violation by the defendants of a right to exclusive use by the plaintiffs of a patented property interest. Infringement of the patent is an interference with this property right. It follows that unfair competition in the sale of a product which infringes a patented process is also a violation of the right to exclusive use. The sale of the infringing product of the patent process is not to be disregarded in determination of the element of unfair competition. Such element constitutes a basis and ground for the cause of action and should

be accorded consideration in view of the surrounding circumstances.

VI.

In an action for alleged patent and trade-mark infringement and unfair competition where there was no diversity of citizenship, the invalidity of the patent and trade-mark did not divest the federal courts of jurisdiction over the question of unfair competition.

See: *N.S.W. Co. v. Wholesale Lumber & Millwork, Inc.*, 123 Fed. (2d) 38, (C.C.A. 6, 1941)

VII.

In the case of *Prince Matchabelli, Inc. v. Anhalt & Co., Inc.*, 40 F. Supp. 848 (D.C., S.D.N.Y. 1941), the suit was for alleged patent infringement and also for unfair competition. Said Judge Coxe at page 849:

“In the present case, the complaint charges the defendant with unfair competition in the manufacture and sale of purse kits embodying the invention; the two grounds of relief are inseparably connected, and grow out of the same facts; and there is no contention that the claim of patent infringement is not made in good faith. I think, therefore, that the charge of unfair competition has been properly joined in the complaint, and that the court has jurisdiction.”

VIII.

The majority of the above cited cases are interpretations of the doctrine announced in the case of

Hurn v. Oursler. The rule laid down in that case is not susceptible of any definite line of demarkation as is evident from the mass of case law upon the issue of jurisdiction. The cause of action presented in the complaint is unquestionably and admittedly one of federal jurisdiction under the patent laws of the United States. The element of unfair competition as evidenced by the infringement of the State trade-mark registration is an integral part of the cause of action. As per the authorities cited therefor, the complaint should be accorded recognition and the motion of the defendants denied.

IX.

Where a patent is held valid and infringed the unfair competition feature may be included in accounting for profits and damages though the parties are citizens of the same state.

See: N. O. Nelson Mfg. Co. v. F. E. Myers & Bro. Co., 25 Fed. (2d) 659, C.C.A. 6, 1928)

X.

Under the Henry Act, 35 U.S.C.A. §70, the plaintiff is entitled to recover general damages "for making, using, or selling."

Determining the damages to be assessed for infringement of a process patent the plaintiff should actually be entitled to prove the extent to which the process has been used in making steaks for public sale.

The plaintiffs' damages will be to some degree commensurate with the number of infringing steaks

made and sold by the defendants. Thus the sales by the defendants are an important issue in this case.

Therefore, a single cause of action is believed established in this case, since the sales of steaks made in infringement of the patent in suit is not only the basis for determining the amount of damages due the plaintiffs for infringement, but also are the identical sales that are complained of in the second count under unfair competition.

XI.

The case of *Tilghman v. Proctor*, 125 U.S. 136, 31 L.Ed. 664 involved infringement of a patent on a process. Relative to the recovery by the plaintiff, Mr. Justice Gray said at page 144:

“But upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention.”

XII.

The law and cases referred to in the above paragraphs IX, X, and XI are indicative of the manner of ascertaining the measure of damages sustained by the plaintiffs. The allegations of the complaint are appropriately directed to this end. Consequently the motion of the defendants should be denied.

Respectfully submitted,

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1948.

[Title of District Court and Cause.]

PLAINTIFFS' MOTION TO STRIKE PART
OF COMPLAINT

Come Now the above-named plaintiffs, by their counsel, and move to strike lines 12 and 13 of page 3 of the complaint and as grounds therefor show that the paragraphs in the complaint are consecutively numbered, arise from the same cause of action and the complaint is in no way rendered indefinite by the deletion of these lines.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Receipt of Copy acknowledged. .

[Endorsed]: Filed Nov. 1, 1948. [21]

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM OF DE-
FENDANTS RAYFORD CAMP & CO. AND
RAYFORD CAMP

Come now the defendants Rayford Camp & Co. and Rayford Camp and in answer to the Complaint allege, aver, and deny as follows:

I.

Answering paragraph I of the Complaint, defendants deny that the plaintiff William J. Dubil is the inventor of the Method of Preparing Fresh

Meat covered by United States Letters Patent No. 2,052,221 and allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph I of the Complaint.

II.

Answering paragraph II of the Complaint, defendants admit that United States Letters Patent No. 2,052,221 were issued on August 25, 1936, to [23] the plaintiffs Dubil and Hubik for an alleged invention in Method of Preparing Fresh Meat, and defendants allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph II of the Complaint.

III.

Answering paragraph III of the Complaint, defendants deny that anyone has the exclusive right to practice the method alleged to be covered by said patent and allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph III of the Complaint.

IV.

Answering paragraph IV of the Complaint, defendants allege that defendant Rayford Camp is a citizen of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford

Camp & Co., but generally and specifically deny each and every remaining allegation contained in said paragraph.

V.

Answering paragraph V of the Complaint, defendants admit that this Honorable Court has jurisdiction of the claim or cause of action for patent infringement stated in paragraphs I through VII of the Complaint herein, but defendants deny that this Honorable Court has jurisdiction of the claim, cause or causes of action stated in paragraphs VIII through X of said Complaint.

VI.

Answering paragraph VI of the Complaint, defendants generally and specifically deny each and every allegation contained therein. [24]

VII.

Answering paragraph VII of the Complaint, defendants deny committing any act or acts of infringement and admit the remaining allegations of paragraph VII of the Complaint.

VIII.

Answering paragraph VIII of the Complaint, defendants deny that any trade-mark and label have come to be associated with the plaintiff Shores in the minds of the public, and defendants allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations contained in paragraph VIII of the Complaint.

IX.

Answering paragraph IX of plaintiffs' Complaint, defendants admit that defendants' label contains the words "Camp Steak" arranged in a curve or arch adjacent the picture of the head of a beef animal, with the picture of the head of the animal arranged prominently and centrally of the label, but defendant generally and specifically deny each and every remaining allegation contained in paragraph IX of plaintiffs' Complaint.

X.

Answering paragraph X of plaintiffs' Complaint, defendants deny committing any acts of infringement and/or unfair competition and deny that they will continue to do so unless restrained by this Court, and defendants admit the remaining allegations of paragraph X of the Complaint.

Further Answering Plaintiffs' Complaint with respect to the Claim or Cause of Action for Patent Infringement alleged in Paragraphs I through VII thereof, and for Separate, Alternate and Further Defenses Thereto, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

A. That these defendants have not infringed pretended Letters [25] Patent No. 2,052,221 or any claim or claims thereof;

B. That pretended Letters Patent No. 2,052,221 were not granted by the Commissioner of Patents within the authority granted him under due form of law or after due proceedings were had with respect to the application filed by or on behalf of

plaintiffs, or any of them, and said pretended Letters Patent were irregularly granted without proper or due consideration of the application for same;

C. That William J. Dubil was not the original or first inventor of that which is alleged to be patented in said pretended Letters Patent, No. 2,052,221, in suit, or any material or substantial part thereof, but on the contrary, prior to the supposed invention or discovery thereof, the method or other thing or things alleged to be patented by said pretended Letters Patent No. 2,052,221, and particularly that which is described in the pretended claims thereof and are material and substantial parts thereof, have been patented and/or described in certain prior printed publications and/or Letters Patent, the numbers of which, the names of the patentees thereof, and the dates of the said Letters Patent or publications these defendants have not yet fully located and for which they are diligently searching and pray leave to add to this answer;

D. That, prior to any supposed discovery and/or invention by William J. Dubil, that which is alleged to be patented by pretended Letters Patent No. 2,052,221, and particularly that which is described and claimed therein and are material and substantial parts thereof, had been invented, used by, and/or known to certain persons in this country whose names and places of residence these defendants have not fully learned, and for which these defendants are diligently searching and pray leave to add to this answer;

E. That in view of the state of the art at and before the alleged invention or inventions of pretended Letters Patent No. 2,052,221, or attempted to be defined in any claim or claims of said pretended Letters Patent, said claims, or any of them, cannot now be so interpreted as to bring within their purview as an infringement thereof, any method of process as used by these defendants; [26]

F. That while the alleged application under the requirements of the Commissioner of Patents that plaintiffs, or any of them, cannot now seek for or obtain a construction for any claim of said pretended Letters Patent sufficiently broad to cover any method or process used by these defendants;

G. That the alleged invention of pretended Letters Patent No. 2,052,221, in view of the state of the art as it existed at the date of the alleged invention or inventions, does not involve invention or contain any patentable novelty but consists of the mere adaption of well known methods or devices for the required uses, involving merely the skill expected of one in the art to which said pretended Letters Patent pertain;

H. That pretended Letters Patent No. 2,052,221, and each and every of the claims thereof, is invalid and void because the patentee thereof failed to particularly point out and distinctly claim the parts, combinations, or methods alleged to constitute the invention or discovery thereof;

I. That plaintiffs have employed and are now employing said pretended Letters Patent No. 2,052,-221 improperly and without the sanction of law to restrain commerce in and secure a limited monopoly of unpatented material, to wit, thinly sliced beef, in an effort to extend the monopoly of said pretended Letters Patent No. 2,052,221 beyond its lawful scope, wherefore plaintiffs are not entitled to assert said Letters Patent against these defendants.

Further Answering Plaintiffs' Complaint with respect to the Claims or Causes of Action for Trade-Mark Infringement and Unfair Competition alleged in paragraphs VIII through X of Plaintiffs' Complaint and for Separate, Alternate, and Further Defenses Thereto, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

J. That the alleged trade-mark "Chip Steak" is merely descriptive of the goods or merchandise with which it is used, or of the class, [27] character, or quality of said goods or merchandise and is not and has not, at any time since the alleged use thereof by plaintiffs, been the proper subject of any trade-mark registration;

K. That the alleged trade-mark "Chip Steak" comprises or consists of words which are and have been, prior to the alleged use thereof by plaintiffs, in the public domain and may not be exclusively appropriated by plaintiffs for use in connection with the sale of thinly sliced steaks;

L. That this Honorable Court has no jurisdic-

tion over the cause or causes of action for trademark infringement and unfair competition alleged in paragraphs VIII through X of the Complaint herein.

For a Counterclaim against Plaintiffs Edward J. Hubik and William J. Dubil to the Claim or Cause of Action for Patent infringement Alleged in Paragraphs I through VII of Plaintiffs' Complaint Herein, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

I.

That defendant-counter claimant Rayford Camp is a citizen of the State of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co.

II.

That on information and belief plaintiff-counter-defendants William J. Dubil and Edward J. Hubik are each citizens of the State of California and are the alleged owners of pretended United States Letters Patent No. 2,052,221.

III.

That this is an action arising under the patent statutes of the United States, and the jurisdiction of this Court is founded thereon. [28]

IV.

That this counterclaim is brought under § 247(d) of the Judicial Code, 28 U.S.C.A. Sec. 400, because

there is an actual controversy now existing between the parties in respect of which these defendants need a declaration of their rights by this court, which controversy arises over the question of validity and infringement of United States Letters Patent No. 2,052,221 alleged to be owned by plaintiffs William J. Dubil and Edward J. Hubick, and of each and every of the claims thereof, in that these plaintiffs have charged these defendants with infringing said Letters Patent.

V.

That defendants adopt, repeat and reallege as paragraphs V to XIII, inclusive, of this counterclaim each and every of the allegations contained in paragraphs A to I, inclusive, of defendants' answer above set forth with like effect as if fully herein repeated.

For a Counterclaim Against Plaintiff Edward J. Hubik to the Claim or Cause of Action for Trade-Mark Infringement Alleged in Paragraphs VIII through X of Plaintiffs' Complaint herein, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

I.

That defendant-counterclaimant Rayford Camp is a citizen of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co.

II.

That on information and belief plaintiff-counter-defendant Edward J. Hubik is a citizen of California and resident of the County of Los Angeles, State of California. [29]

III.

That on information and belief plaintiff-counter-defendant Edward J. Hubik on September 14, 1936, registered or caused to be registered in the office of the Secretary of the State of California at Sacramento, California, Registration No. 20515, the alleged trade-mark "Chip Steak."

IV.

That the alleged trade-mark "Chip Steak" was and is not a proper subject of trade-mark registration and was and is registered contrary to and in violation of the laws of the State of California and is subject to cancellation thereunder in that said alleged trade-mark is merely descriptive of the goods or merchandise with which it is used, or of the class, character, or quality of such goods or merchandise, and comprises and consists of words which are and have been, prior to any use thereof by the plaintiff-counterdefendant, in the public domain.

Wherefore, these defendants pray for judgment against plaintiffs herein as follows:

(a) That the Complaint herein be dismissed.

(b) For declaratory judgment adjudging said Letters Patent No. 2,052,221, and each of the claims thereof, invalid and void and that said Letters Pat-

ent have not been infringed by these defendants.

(c) That said trade-mark "Chip Steak" is invalid and void and ordering the registration thereof cancelled pursuant to Section 14246 of the Business and Professions Code of the State of California.

(d) That these defendants have not been guilty of any acts of unfair competition or trade-mark infringement.

(e) That these defendants recover from plaintiffs, and each of them, reasonable attorneys' fees.

(f) That these defendants recover from plaintiffs the taxable costs of this action. [30]

(g) That these defendants be granted such other and equitable relief as may be proper.

Dated: At Los Angeles, California, this 10th day of November, 1948.

HARRIS, KIECH, FOSTER &
HARRIS, FORD HARRIS,
JR., WARREN L. KERN,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants
Rayford Camp & Co. and
Rayford Camp.

RAYFORD COMP & CO. and
RAYFORD CAMP,

By /s/ RAYFORD CAMP.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1948.[31]

[Title of District Court and Cause.]

NOTICE UNDER 35 U.S.C. 69

To William J. Dubil, Edward J. Hubik, and Earl F. Shores, Plaintiffs; and C. G. Stratton, Esq., their Attorney;

Please Take Notice that Defendants at the trial of this action will rely on the following United States Letters Patent to prove the defenses stated in Paragraph C of the Answer on file herein:

Patent No.	Patentee	Date of Application	Date of Grant
1,864,284	Harden F. Taylor	July 1, 1929	June 21, 1932
1,864,285	Harden F. Taylor	May 23, 1931	June 21, 1932
2,137,897	Harry H. McKee and Floyd Seaver	Oct. 6, 1930	Nov. 22, 1938
2,140,162	Harry H. McKee	June 6, 1929	Dec. 13, 1938

Defendants at the trial of this action will rely on the following prior usages to prove the defenses stated in Paragraph D of the Answer on file herein:

By Whom Used	Where Used
Rayford Camp	Los Angeles County, Calif.
S. D. Baird	Los Angeles County, Calif.
Edward Joseph Hubik	Los Angeles County, Calif.

Dated: At Los Angeles, California, this 4th day of February, 1949.

HARRIS, KIECH, FOSTER
& HARRIS,

FORD HARRIS, JR.,

WARREN L. KERN,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants Rayford Camp & Co. and Rayford Camp.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 7, 1949. [34]

[Title of District Court and Cause.]

DEFENDANTS' INTERROGATORIES UNDER
RULE 33

Now come the defendants, Rayford Camp & Co. and Rayford Camp, and, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, propound the following interrogatories to be answered separately and fully in writing under oath by each of the plaintiffs herein:

I. Did plaintiffs, or any of them, or others, prior to September 13, 1935, practice the method claimed in the patent in suit?

II. If the answer to Interrogatory I is in the affirmative, state:

(a) When said method was first practiced;

(b) By whom said method was first practiced;

(c) Where said method was first practiced;

(d) The minimum temperature of the meat at the time of [36] slicing thereof in the practice of said method prior to September 13, 1935.

(e) The earliest date, or approximate date, upon which the products made by the practice of said method were sold to the public or members thereof.

III. Did plaintiffs, or any of them, prior to the issuance of the patent in suit, test or determine the temperature range within which meat must be at the time of slicing in order to practice the method or methods claimed in the patent in suit.

IV. If the answer to Interrogatory III is in the affirmative, state:

(a) When and where said test or determination was made;

(b) By whom said test or determination was made;

(c) The temperature range determined to be suitable;

(d) The method of temperature measurement employed in making such test or determination;

(e) Whether it was found by such test or determination that meat at a temperature of 28° F. could be thinly sliced;

(f) Whether it was found by such test or determination that meat at a temperature below 28° F. could be thinly sliced.

V. State:

(a) The exact temperature range or limits within which meat must be at the time of slicing in performing the method of the patent in suit;

(b) Whether plaintiffs, or any of them, will contend at the trial of this action that the method claimed by the patent in suit may be performed by slicing the meat at a temperature of 28° F.

(c) Whether plaintiffs, or any of them, will contend at the trial of this action that the method claimed by the patent in suit may be performed by slicing the meat at a temperature of 27° F. [37]

VI. State which of the claims of the patent in suit plaintiffs, or any of them, will contend at the trial of this action are or have been infringed by defendants, or either of them, and in connection therewith:

(a) State separately which of such claims are or have been infringed by each of the defendants as a result of the preparing of fresh meat, and which are, or have been infringed by each of the defendants, as a result of their selling and using fresh meat prepared in accordance with the alleged patented invention.

VII. Referring to the transcript of the deposition of defendant Rayford Camp taken on January 18, 1949, page 27, lines 4 to 10 thereof, state whether the method described by said defendant therein will be contended by plaintiffs, or any of them, at the trial of this action to infringe the patent in suit, and, if so, the particular claims which it will be urged are infringed thereby.

VIII. Referring to the transcript of the deposition of defendant Rayford Camp taken on January 18, 1949, page 29, lines 6 to 14 thereof, state whether the method described by said defendant therein will be contended by plaintiffs, or any of them, at the trial of this action to infringe the patent in suit, and, if so, the particular claims which it will be urged are infringed thereby.

IX. State whether any method other than that identified in Interrogatories VII and VIII, above,

will be contended by plaintiffs, or any of them, at the trial of this action to be, or have been, performed by defendants, which other method it will be urged at the trial of this action infringes the patent in suit.

X. If the answer to Interrogatory IX is in the affirmative, briefly describe each such other method, and state separately when, where, and by whom performed, and which claims of the patent in suit will be claimed to [38] be infringed thereby.

XI. State whether plaintiffs, or any of them, will contend at the trial of this action that the patent in suit is infringed by a method of preparing fresh meat identical to that described and claimed in said patent except that the meat is at a temperature of 28° F. throughout at the time of slicing, instead of at a temperature of approximately 30° F. to 32° F.

XII. State whether plaintiffs, or any of them, will contend at the trial of this action that the patent in suit is infringed by a method of preparing fresh meat identical to that described and claimed in said patent except that the meat is at a temperature of 27° F. throughout at the time of slicing, instead of at a temperature of approximately 30° F. to 32° F.

XIII. State whether plaintiffs, or any of them, will contend at the trial of this action that the patent in suit is infringed by a method of preparing fresh meat identical to that described and claimed in said patent except that the meat is at a temperature of

less than 27° F. throughout at the time of slicing, instead of at a temperature of 30° F. to 32° F., and if so, state the lowest temperature at which the meat can be to practice the method described and claimed in said patent.

XIV. State the exact meaning of the following expressions appearing in the specification or claims of the patent in suit:

- (a) "Very thin slices of fresh meat";
- (b) "To freeze the meat solid";
- (c) "Partially thawing";
- (d) "Thawing the meat";
- (e) "Approximately 30° to 32° F."

XV. State whether plaintiffs, or any of them, have at any time granted any license or other right to any parties other than any plaintiffs herein under the patent in suit, and, if the answer is in the affirmative, give [39] the names and addresses of each of such parties and attach a copy of each of said licenses or instruments granting other rights.

XVI. How or in what manner will plaintiffs, or any of them, contend at the trial of this action that the use of the defendants' label in the territory of plaintiff Shores is calculated to or will deceive the public into buying defendants' meat as the product of plaintiffs, or any of them.

XVII. State the names and addresses of all members of the general public known to plaintiffs,

or any of them, who have been deceived by defendants' label on thinly sliced meat into believing they were buying the thinly sliced meat of plaintiffs, or any of them.

XVIII. State the names and addresses of all retail butchers known to plaintiffs, or any of them, who have been deceived by defendants' label on thinly sliced meat.

XIX. State whether it will be urged by plaintiffs, or any of them, at the trial of this action that defendants, or any of them, are or have been engaging in any acts of unfair competition in connection with the preparation of thinly sliced meat and apart from the use or sale thereof.

XX. If the answer to Interrogatory XIX is in the affirmative, state briefly the unfair acts which will be claimed to have been performed by defendants in preparing thinly sliced meat.

XXI. If fresh steer beef frozen when it is at a temperature of 31° F. throughout?

XXII. If you cannot answer Interrogatory XXI, explain why.

XXIII. Is fresh steer beef frozen when it is at a temperature [40] of 30° F. throughout?

XXIV. If you cannot answer Interrogatory XXIII, explain why.

XXV. With reference to frozen fresh meat, is "tempering" synonymous with "thawing"?

XXVI. If your answer to Interrogatory XXV is in the negative, define the word "tempering" as used in connection with the handling of fresh meat.

XXVII. In the processing of frozen fresh meat, is there any difference in the resulting product in the practice of the following two methods:

(a) Take fresh meat at atmospheric temperature (e.g. 55° F.); cool it to a minimum temperature of 30° F. to 32° F. throughout; and then slice while the meat is at a temperature of 30° F. to 32° F. throughout; and

(b) Take fresh meat at atmospheric temperature (e.g. 55° F.); cool it to a minimum temperature of 0° F.; raise its temperature to 30° F. to 32° F. throughout; and then slice while the meat is at a temperature of 30° F. to 32° F. throughout.

XXVIII. If your answer to Interrogatory XXVII is in the affirmative, state in detail every such difference in the product.

Dated: At Los Angeles, California, this 7th day of February, 1949.

HARRIS, KIECH, FOSTER
& HARRIS,

WARREN L. KERN,

By /s/ FORD W. HARRIS, JR.,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 8, 1949. [41]

[Title of District Court and Cause.]

PLAINTIFFS' INTERROGATORIES
UNDER RULE 33

Now come the plaintiffs, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, and propound the following interrogatories, each division of which is to be answered separately and fully in writing under oath by each of the defendants Rayford Camp & Co., and Rayford Camp.

1. Are the patents cited in your Notice under 35 U.S.C. 69, served in this case, and the oral testimony of the three witnesses named therein, all that will be relied upon at the trial of this case:

(a) To anticipate the patent in suit?

(b) To show the state of the art? [43]

2. If the answer to either part of interrogatory 1 is in the negative, please give:

(a) The numbers, patentees and dates and all additional patents to be used at the trial;

(b) The names and addresses of all additional persons alleged to have used the method covered by the patent in suit; and

(c) Full information about any exhibits to be used in support thereof.

Dated at Los Angeles, California, this 16th day of February, 1949.

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed February 17, 1949. [44]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for the above-named plaintiffs and for the defendants Rayford Camp & Co., and Rayford Camp, that the plaintiffs may file the annexed Amended Reply in this case, and that it may be used in lieu of the Reply heretofore filed herein.

Dated at Los Angeles, California, this 11th day of February, 1949.

/s/ C. G. STRATTON,

Attorney for the Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS

FORD HARRIS, Jr.,

WARREN L. KERN,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants Rayford Camp & Co., and
Rayford Camp.

It Is Ordered that the annexed Amended Reply be filed.

/s/ PAUL J. McCORMACK,

U.S. District Judge. [46]

[Title of District Court and Cause.]

AMENDED REPLY OF PLAINTIFFS WIL-
LIAM J. DUBIL AND EDWARD J. HUBIK
TO COUNTERCLAIMS OF DEFENDANTS

Now Come the plaintiffs William J. Dubil and Edward J. Hubik, hereinafter referred to as said plaintiffs, and as an amended reply to the counterclaims of the defendants, allege, admit and deny as follows:

I.

In reply to the first counterclaim against the said plaintiffs beginning on page 6, line 12, and extending to and including line 15 on page 7 of the Answer and Counterclaim of the defendants, hereinafter referred to as the First Counterclaim, the said plaintiffs admit, allege and deny as follows:

(a) Admit the allegations contained in Paragraph I of the First Counterclaim. [47]

(b) Admit that said plaintiffs are residents of the State of California, and that said plaintiffs are the owners of United States Letters Patent No. 2,052,221.

(c) Admit the allegations contained in Paragraph III of the First Counterclaim.

(d) Admit the allegations contained in Paragraph IV of the First Counterclaim, except that as to the averment that the defendants need a declaration of their rights by this Court, the said plain-

tiffs are without knowledge or information sufficient to form a belief as to the truth of such averment.

(e) Deny each and every allegation contained in Paragraphs V to XIII, inclusive, of the First Counterclaim.

II.

In reply to the second counterclaim against the plaintiff Edward J. Hubik, beginning on page 7, line 17, and extending to and including line 15 on page 8 of the Answer and Counterclaim of the defendants, hereinafter referred to as the Second Counterclaim, the plaintiff Hubik admits, alleges and denies as follows:

(a) Admits the allegations contained in Paragraph I of the said Second Counterclaim.

(b) Admits that he is a resident of the County of Los Angeles, State of California.

(c) Admits the allegations contained in Paragraph III of the Second Counterclaim.

(d) Denies each and every allegation contained in Paragraph IV of the Second Counterclaim.

III.

That in both the First Counterclaim and Second Counterclaim, the defendant Rayford Camp is suing under the fictitious name of Rayford Camp & Co. That the said plaintiffs are informed and believe and upon information and belief allege that

the defendant Rayford Camp continuously since approximately the spring of 1948 [48] has been and is doing business in Los Angeles County, State of California, under the fictitious name of Rayford Camp & Co., but that such fictitious name has not not been published or recorded in Los Angeles County, State of California.

Wherefore, the said plaintiffs pray:

(a) that the First and Second Counterclaims herein be dismissed;

(b) that the registration in the State of California, No. 20,515, of the trade-mark "Chip Steak" be declared valid and infringed by the defendants herein;

(c) that the plaintiffs in this action recover reasonable attorney's fees from the defendants herein; and

(d) for such other and further relief which to the Court appears just and equitable in the premises.

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

[Endorsed]: Filed February 18, 1949. [49]

[Title of District Court and Cause.]

NOTICE

Notice is hereby given that on Monday, February

28, 1949, at 10:00 a.m., or as soon thereafter as counsel can be heard, the undersigned will present to the Honorable Leon R. Yankwich, United States District Judge of the above-entitled court, the annexed Objections to defendants' interrogatories. The time of this notice is shortened by reason of the closeness of the trial, which is set for March 8th, 1949.

Dated at Los Angeles, California, this 17th day of February, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' INTERROGATORIES

Plaintiffs object to the following interrogatories propounded by defendants:

1. Defendants' interrogatory V is objected to on the grounds that it asks for an opinion, is indefinite, calls for a conclusion which is within the province of the court to decide, and calls for the contentions that the plaintiffs will make at the trial of the case.
2. Defendants' interrogatories VII to XIII, inclusive, are objected to on the ground that each of them calls for the contention that the plaintiffs will make at the trial of this case.
3. Defendants' interrogatory XIV is objected to on the ground that it calls for an opinion, calls for

conclusions which are within the province of the court to decide, and calls for the contentions that the plaintiffs will make at the trial hereof.

4. Defendants' interrogatory XV is objected to as immaterial in this case and not tending to prove or disprove any of the issues of this case. Further objection is made to the request for copies of licenses, since the procedure set forth in Rule 34 should be followed for the production of documents.

5. Defendants' interrogatories XVI, XIX and XX are objected to on the ground that they call for the contentions that the plaintiffs will make at the trial hereof.

6. Defendants' interrogatories XXI to XXVI, inclusive, are objected to on the ground that they ask for opinions and conclusions which are within the province of the court to decide. Interrogatory XXV is also argumentative.

7. Defendants' interrogatories XXVII and XXVIII are objected to as calling for comparisons, as well as for an opinion and for a conclusion which is within the province of the court to decide.

At the hearing in this matter, the plaintiffs will rely upon the file in this case and upon the annexed Points and Authorities and upon the objections given above.

Dated at Los Angeles, California, this 17th day of February, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Points and Authorities

“It is the ascertainment of facts that is the object of discovery proceedings as contrasted with opinions, conclusions and contentions.”

—*Cinema Amusements v. Loew's, Inc.*, 7 F.R.D. 318, 320.

“That contentions, opinions and legal conclusions may not be required by interrogatories is sustained by numerous decisions.”

—*U.S. v. Columbia Steel Co.*, 7 F.R.D. 183, 185.

“Interrogatories 26, 29, 31, 32 and 33 are all objectionable as asking for plaintiff's contentions or opinions.”

—*Sutherland Paper Co. v. Grant Paper Box Co.*, 8 F.R.D. 416, 418.

“It has been held by many courts that interrogatories requiring expression of opinions, or for conclusions, are objectionable.”

“It may also be pointed out that interrogatories which seek to require the responding party to make comparisons are objectionable. *Boysell Co. v. Colonial Coverlet Co.*, D.C., 29 F.Supp. 123; *Looper v. Colonial Coverlet Co.*, D.C., 29 F.Supp. 125.”

—*Porter v. Montaldo's*, 71 F.Supp. 372, 375.

—See also *Canuso v. City of Niagara Falls*, 4 F.R.D. 362.

“Interrogatories propounded by defendants calling for opinions and requiring plaintiffs to make comparisons of structures were held subject to objection in *Carter Bros. v. Cannon*, D.C. Tenn., 2 F.R.D. 174.”

—Hoak v. Empire Steel Corp., 5 F.R.D. 330, 331.

“Interrogatories Nos. 2 and 4, as stated, call upon plaintiffs to compare the elements of the patent claims with defendant’s engine. These interrogatories demand neither an ultimate nor evidentiary fact, but call for an opinion.”

—Lanova Corp. v. National Supply Co., 29 F.Supp. 119, 120.

“The objection is based upon the demand that the plaintiff furnish copies of certain licenses mentioned in the interrogatories.

“The objection must be sustained. The interrogatories are issued under the authority of the Federal Rules of Civil Procedure, Rule 33, 28 U.S.C.A., which does not authorize the demand made. If the defendants are entitled to the copies demanded they must show ‘good cause therefor’ * * * as required by Rule 34.”

—Bruen v. Huff, 8 F.R.D. 322.

“Interrogatory 36 to Loews, Inc., reads: ‘If you have any written agreement with any or all of the other defendants * * * attach copy or copies thereof to your answers to those interrogatories.’

“This interrogatory was objected to, and as the Rules do not require the attaching of copies, the objection is sustained.”

—Roth v. Paramount Film Distributing Corp., 4 F.R.D. 302, 305.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 19, 1949.

[Title of District Court and Cause.]

PLAINTIFFS' ANSWERS TO CERTAIN OF
DEFENDANTS' INTERROGATORIES

Comes now the plaintiff Earl F. Shores, and in answer to the defendants' interrogatories which have not been objected to, the said plaintiff states:

1. Answering defendants' interrogatory "I," the said plaintiff states that as to the group mentioned therein including "plaintiffs, or any of them, or others," at least one of that group did practice the method claimed in the patent in suit prior to September 13, 1935.

2. Answering interrogatory "II":

(a) Said method was first practiced about a year prior to that date.

(b) Said method was first practiced by the plaintiff [50] William J. Dubil, in South Gate, California.

(c) Answer given in (b).

(d) The minimum temperature at which the meat was actually sliced, prior to September 13, 1935, in the satisfactory practice of said method, is believed to be approximately 30° F.

(e) The products made by the practice of said method were sold to the public approximately the same time that the method was first practiced, as stated above.

3. Answering interrogatory "III"; One or

more of the plaintiffs prior to the issuance of the patent in suit did test or determine the temperature range within which the method or methods claimed in the patent in suit were best practiced.

4. Answering interrogatory "IV":

(a) Said test or determination was made about a year prior to the application for the patent in suit in South Gate, California.

(b) The test or determination was made by the plaintiff William J. Dubil.

(c) Approximately 30° to 32° was determined to be suitable.

(d) The method of temperature measurement employed were by a thermometer and by feeling the meat.

(e) Such test or determination found that meat was not satisfactorily sliced thinly at a temperature of 28° F.; the slices were broken, slices were skipped and slices were thicker at one side than on another.

(f) No test or determination was made at that time for thinly slicing meat at a temperature below 28° F.

5. Answering interrogatory "VI": The plaintiffs will contend at the trial of this action that claims 1, 2, 4 and 6 are [51] infringed by the defendants.

(a) The defendants are charged to infringe by their preparation of fresh meat. Of course, infringe-

ment of the patent in suit is not claimed by selling or using the product of the patented invention.

6. Answering interrogatories “XVII” and “XVIII,” except for the following, the plaintiff Earl F. Shores does not at this time have the names and addresses of any members of the general public who have been deceived by defendants’ label into believing they were buying the thinly sliced meat of the plaintiffs’, or any of them, or the name of any retail butcher who has been deceived by defendants’ label on thinly sliced meat.

GUNDEERSON BROTHERS,
11448 Long Beach Boulevard,
Lynwood, California.

PARK MARKET,
2818 E. Gage Avenue,
Huntington Park, California.

GREATER ALL-AMERICAN
MARKET,
8351 E. Firestone Boulevard,
Downey, California.

/s/ EARL F. SHORES.

Subscribed and sworn to before me this 23rd day of Feb., 1949.

[Seal] /s/ VESTA NELSON,

Notary Public in and for the County of Los Angeles, States of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 24, 1949. [52]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT, AND
COUNTERCLAIM, OF DEFENDANTS
RAYFORD CAMP & CO. and RAYFORD
CAMP

Come now the defendants Rayford Camp & Co. and Rayford Camp and in answer to the Amended Complaint allege, aver, and deny as follows:

I.

Answering paragraph I of the Amended Complaint, defendants deny that the plaintiff William J. Dubil is the inventor of the Method of Preparing Fresh Meat covered by United States Letters Patent No. 2,052,221 and allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph I of the Complaint. [62]

II.

Answering paragraph II of the Amended Complaint, defendants admit that United States Letters Patent No. 2,052,221 were issued on August 25, 1936, to the plaintiffs Dubil and Hubik for an alleged invention in Method of Preparing Fresh Meat, and defendants allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph II of the Complaint.

III.

Answering paragraph III of the Amended Com-

plaint, defendants deny that anyone has the exclusive right to practice the method alleged to be covered by said patent and allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations of paragraph III of the Complaint.

IV.

Answering paragraph IV of the Amended Complaint, defendants allege that defendant Rayford Camp is a citizen of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co., but generally and specifically deny each and every remaining allegation contained in said paragraph.

V.

Answering paragraph V of the Amended Complaint, defendants admit that this Honorable Court has jurisdiction of the claim or cause of action for patent infringement stated in paragraphs I through VII of the Complaint herein, but defendants deny that this Honorable Court has jurisdiction of the claim, cause or causes of action stated in paragraphs VIII through X of said Complaint. [63]

VI.

Answering paragraph VI of the Amended Complaint, defendants generally and specifically deny each and every allegation contained therein.

VII.

Answering paragraph VII of the Amended Complaint, defendants deny committing any act or acts of infringement and admit the remaining allegations of paragraph VII of the Complaint.

VIII.

Answering paragraph VIII of the Amended Complaint, defendants deny that any trade-mark and label have come to be associated with the plaintiff Shores in the mind of the public, and defendants allege that they have no knowledge or information sufficient to enable them to form a belief as to the truth of the remaining allegations contained in paragraph VIII of the Complaint.

IX.

Answering paragraph IX of the Amended Complaint, defendants admit that defendants' label contains the words "Camp Steak" arranged in a curve or arch adjacent the picture of the head of a beef animal, with the picture of the head of the animal arranged prominently and centrally of the label, but defendants generally and specifically deny each and every remaining allegation contained in paragraph IX of plaintiffs' Complaint.

X.

Answering Paragraph X of the Amended Complaint, defendants generally and specifically deny each and every allegation contained therein.

XI.

Answering Paragraph XI of the Amended Com-

plaint, defendants generally and specifically deny each and every allegation contained therein. [64]

Further answering the Amended Complaint with respect to the Claim or Cause of Action for Patent Infringement alleged in Paragraphs I through VII thereof, and for Separate, Alternate and Further Defenses Thereto, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

A. That these defendants have not infringed pretended Letters Patent No. 2,052,221 or any claim or claims thereof;

B. That pretended Letters Patent No. 2,052,221 were not granted by the Commissioner of Patents within the authority granted him under due form of law or after due proceedings were had with respect to the application filed by or on behalf of plaintiffs or any of them, and said pretended Letters Patent were irregularly granted without proper or due consideration of the application for same;

C. That William J. Dubil was not the original or first inventor of that which is alleged to be patented in said pretended Letters Patent, No. 2,052,221, in suit, or any material or substantial part thereof, but on the contrary, prior to the supposed invention or discovery thereof, the method or other thing or things alleged to be patented by said pretended Letters Patent No. 2,052,221, and particularly that which is described in the pretended claims thereof and are material and substantial parts thereof, have been patented and/or described in certain

prior printed publications and/or Letters Patent, the numbers of which, the names of the patentees thereof, and the dates of the said Letters Patent being as follows:

Patentee	Number	Date of Issue
Harden F. Taylor	1,864,284	June 21, 1932
Harden F. Taylor	1,864,285	June 21, 1932
Harry H. McKee and Floyd Seaver	2,137,897	November 22, 1938
Harry H. McKee	2,140,162	December 13, 1938

D. That, prior to any supposed discovery and/or invention by William J. Dubil, that which is alleged to be patented by pretended Letters [65] Patent No. 2,052,221, and particularly that which is described and claimed therein and are material and substantial parts thereof, had been invented, used by and/or known to the patentees identified in Paragraph C hereof, and in addition thereto by the following persons:

By Whom Used	Where Used
Rayford Camp	Los Angeles County, Calif.
S. D. Baird	Los Angeles County, Calif.
E. J. Hubik	Los Angeles County, Calif.

E. That in view of the state of the art at and before the alleged invention or inventions of pretended Letters Patent No. 2,052,221, or attempted to be defined in any claim or claims of said pretended Letters Patent, said claims, or any of them, cannot now be so interpreted as to bring within their purview as an infringement thereof, any method of process as used by these defendants;

F. That while the alleged application for pretended Letters Patent No. 2,052,221 was pending in the United States Patent Office the applicant there-

for so limited and confined the claims of said alleged application under the requirements of the Commissioner of Patents that plaintiffs, or any of them, cannot now seek for or obtain a construction for any claim of said pretended Letters Patent sufficiently broad to cover any method or process used by these defendants;

G. That the alleged invention of pretended Letters Patent No. 2,052,221, in view of the state of the art as it existed at the date of the alleged invention or inventions, does not involve invention or contain any patentable novelty but consists of the mere adaption of well known methods or devices for the required uses, involving merely the skill expected of one in the art to which said pretended Letters Patent pertain;

H. That pretended Letters Patent No. 2,052,221, and each and every one of the claims thereof, is invalid and void because the patentee thereof failed to particularly point out and distinctly claim the parts, combinations, [66] or methods alleged to constitute the invention or discovery thereof;

I. That plaintiffs have employed and are now employing said pretended Letters Patent No. 2,052,221 improperly and without the sanction of law to restrain commerce in and secure a limited monopoly of unpatented material, to wit, thinly sliced beef, in an effort to extend the monopoly of said pretended Letters Patent No. 2,052,221 beyond its lawful scope, wherefore plaintiffs are not entitled

to assert said Letters Patent against these defendants.

Further Answering Plaintiffs' Amended Complaint with respect to the claims or Causes of Action for Trade-Mark Infringement and Unfair Competition alleged in paragraphs VIII through X thereof and for Separate, Alternate, and Further Defenses Thereto, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

J. That the alleged trade-mark "Chip Steak" is merely descriptive of the goods or merchandise with which it is used, or of the class, character, or quality of said goods or merchandise and is not and has not, at any time since the alleged use thereof by plaintiffs, been the proper subject of any trade-mark registration;

K. That the alleged trade-mark "Chip Steak" comprises or consists of words which are and have been, prior to the alleged use thereof by plaintiffs, in the public domain and may not be exclusively appropriated by plaintiffs for use in connection with the sale of thinly sliced steaks;

L. That this Honorable Court has no jurisdiction over the cause or causes of action for trade-mark infringement and unfair competition alleged in paragraphs VIII through X of the Amended Complaint herein.

M. That one Edward Munyon acted as a salesman of the laminated steaks made by defendant Rayford Camp from about February, 1948, to and

including February 14, 1949, selling said laminated steaks in the County of Los Angeles, State of California. Said laminated steaks were made by one or more processes charged by plaintiffs to infringe Letters [67] Patent No. 2,052,221, here in suit. Said Munyon sold said laminated steaks of said defendant over a route owned and/or controlled by defendant Rayford Camp. The list of customers serviced in said route was and is the property of defendant Rayford Camp. The list of customers on such route was and is a confidential list. On or about February 11, 1949, and while said Munyon was still selling said laminated steaks manufactured by defendant Rayford Camp, and without the knowledge or consent of said defendant, the plaintiff Shores and said Munyon discussed a plan under which said Munyon was to stop selling said laminated steaks made by defendant Rayford Camp and was to commence selling the "Chip Steaks" manufactured by plaintiff Shores, and it was so understood and agreed at that time or thereafter, and further that said Munyon was to solicit the sale of said "Chip Steaks" to the same customers on said route, or some of them, to whom he had previously sold the laminated steaks made by defendant. That in pursuance of said understanding and agreement between the plaintiff Shores and said Munyon, said Munyon on or prior to February 14, 1949 commenced to sell and offer to sell said "Chip Steaks" made by plaintiff Shores to said customers to whom he had previously sold said laminated steaks of defendant Rayford Camp, and since that date has

continued to do so. That since on or about February 14, 1949 said Munyon has sold said "Chip Steaks" to customers of defendant Rayford Camp, misleading them into believing that they were purchasing said laminated steaks made by defendant. That said acts of plaintiff Shores and said Munyon have been with the deliberate intent and purpose by both of them to injure and damage the business of defendant Rayford Camp. That as a result of said acts of plaintiff Shores and said Munyon and otherwise, plaintiff Shores is guilty of unclean hands and is barred from maintaining this action in equity and from obtaining any recovery or relief herein.

For a Counterclaim against Plaintiffs Edward J. Hubik and William J. Dubil to the Claim or Cause of Action for Patent Infringement Alleged in Paragraphs I through VII of the Amended Complaint Herein, [68] Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

I.

That defendant-counterclaimant Rayford Camp is a citizen of the State of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co.

II.

That on information and belief plaintiff-counter-defendants William J. Dubil and Edward J. Hubik are each citizens of the State of California and are the alleged owners of pretended United States Letters Patent No. 2,052,221.

III.

That this is an action arising under the patent statutes of the United States, and the jurisdiction of this Court is founded thereon.

IV.

That this counterclaim is brought under §247(d) of the Judicial Code, 28 U.S.C.A. Sec. 400, because there is an actual controversy now existing between the parties in respect of which these defendants need a declaration of their rights by this court, which controversy arises over the question of validity and infringement of United States Letters Patent No. 2,052,221 alleged to be owned by plaintiffs William J. Dubil and Edward J. Hubik, and of each and every one of the claims thereof, in that these plaintiffs have charged these defendants with infringing said Letters Patent.

V.

That defendants adopt, repeat and reallege as paragraphs V to XIII, inclusive, of this counterclaim each and every one of the allegations contained in paragraphs A to I, inclusive, of defendants' answer above set forth with like effect as if fully herein repeated. [69]

For a Counterclaim Against Plaintiff Edward J. Hubik to the Claim or Cause of Action for Trade-Mark Infringement Alleged in Paragraphs VIII through X of Plaintiffs' Complaint herein, Defendants Rayford Camp & Co. and Rayford Camp allege as follows:

I.

That defendant-counterclaimant Rayford Camp is a citizen of California and resident of the County of Los Angeles, State of California, and is carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co.

II.

That on information and belief plaintiff-counter-defendant Edward J. Hubik is a citizen of California and resident of the County of Los Angeles, State of California.

III.

That on information and belief plaintiff-counter-defendant Edward J. Hubik on September 14, 1936, registered or caused to be registered in the office of the Secretary of the State of California at Sacramento, California, Registration No. 20515, the alleged trade-mark "Chip Steak."

IV.

That the alleged trade-mark "Chip Steak" was and is not a proper subject of trade-mark registration and was and is registered contrary to and in violation of the laws of the State of California and is subject to cancellation thereunder in that said alleged trade-mark is merely descriptive of the goods or merchandise with which it is used, or of the class, character, or quality of such goods or merchandise and comprises and consists of words which are and have been, prior to any use thereof by the plaintiff-counterdefendant, in the public domain. [70]

Wherefore, these defendants pray for judgment against plaintiffs herein as follows:

(a) That the Complaint and Amended Complaint herein be dismissed.

(b) For declaratory judgment adjudging said Letters Patent No. 2,052,221, and each of the claims thereof, invalid and void and that said Letters Patent have not been infringed by these defendants.

(c) That said trade-mark "Chip Steak" is invalid and void and ordering the registration thereof cancelled pursuant to Section 14246 of the Business and Professions Code of the State of California.

(d) That these defendants have not been guilty of any acts of unfair competition or trade-mark infringement.

(e) That these defendants recover from plaintiffs, and each of them, reasonable attorneys' fees.

(f) That these defendants recover from plaintiffs the taxable costs of this action.

(g) That these defendants be granted such other and equitable relief as may be proper.

Dated: At Los Angeles, California, this 4th day of March, 1949.

HARRIS, KIECH, FOSTER &
HARRIS

FORD HARRIS, JR.,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants Rayford Camp & Co. and
Rayford Camp.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 8, 1949. [71]

[Title of District Court and Cause.]

PLAINTIFFS' ANSWERS TO DEFENDANTS'
INTERROGATORIES V(a), VII, VIII, IX,
X and XVI.

Comes now the plaintiff Earl F. Shores, and in answer to defendants' interrogatories V(a), VII, VIII, IX, X and XVI, the said plaintiff states:

V(a). The "exact" temperature range or limits within which meat must be at the time of slicing in performing the method of the patent in suit is unknown to this plaintiff. Temperatures vary with different kinds of meat, depending upon the fatty constituent. The claims call for "approximately" 30° F. to 32° F., which degrees are not believed to be "exact." This plaintiff states that it is believed that the method described by the defendant Rayford Camp in lines 6 to 14 of page 29, of his deposition taken January 18, 1949, is within the temperature range or limits within which meat must be at the time of slicing in performing the method of the [77] patent in suit. Deponent does not believe that meat may be at any lower temperature, at the time of slicing, in performing the method of the patent in suit, than that used by the defendant as aforesaid, and that meat cannot be satisfactorily sliced for the present purpose at higher than 32° F.

VII. There are not sufficient facts stated in interrogatory VII to definitely determine whether the method stated in lines 4 to 10 of page 27, in the deposition of the defendant Rayford Camp,

taken on January 18, 1949, will be contended by the plaintiffs at the trial hereof to infringe the patent in suit. If the meat is not first frozen and then the temperature raised for slicing, it will not be contended that such method is an infringement of the patent in suit. If, however, such process is that the meat is first frozen at 25° F., and later raised to a slicing temperature, at the time of slicing, then such method will be contended that it is an infringement of the patent in suit.

VIII. The plaintiffs will contend at the trial of this action that the method described by the defendant Rayford Camp in lines 6 to 14 of page 29, in his deposition taken January 18, 1949, is an infringement of the patent in suit.

IX and X. This plaintiff at this time does not know of any other method used by the defendants, than those referred to in interrogatories VII and VIII, so is unable to state whether any other method used by the defendants will be contended at the trial hereof to be an infringement. If any other method is used by the defendants which appears to be an equivalent to that referred to in interrogatory VIII, it will also be contended to be an infringement of the patent in suit. No such other method is known to this plaintiff at the present time.

XVI. The plaintiffs will contend at the trial of this action that the simultaneous use of defendants' label in the territory of the plaintiff Shores is calculated to and will deceive [78] the public into buy-

ing defendants' meat as the product of the plaintiff Shores because of the defendants' substantially identical arrangement of the waxed paper between the steaks that consists of six (6) laminations of very thin, fresh meat, because of the arrangement of subject matter on the two labels, because of the similarity of the names "Chip Steaks" and "Camp Steak," because of the arrangement of these names in an arch or curve, because of the central location of the head of a beef animal, because of the distinctive and contrasting coloring of the head of the beef animal, because defendants' label places in the hands of the retail butchers the means for deceiving the public, because of the arrangement of the labels in a stack of said steaks with portions thereof projecting from the stack, because of the similarity of the labels as a whole, and because of the use thereof.

/s/ EARL F. SHORES.

Subscribed and sworn to before me this 5 day of March, 1949.

[Seal] /s/ R. J. LONSDORF,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Jan. 18, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 10, 1949. [79]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for the above named parties that the annexed Amended Complaint may be filed in the above case.

Dated at Los Angeles, California, this 4th day of March, 1949.

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS,

FORD HARRIS, JR.,

By /s/ FORD HARRIS, JR.,

Attorneys for defendants Rayford Camp & Co., and
Rayford Camp.

The annexed Amended Complaint is ordered filed,
this 10th day of March, 1949.

/s/ LEON K. YANKWICH,

Judge, U.S. District Court.

[Endorsed]: Filed March 11, 1949. [85]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Infringement of United States Letters Patent
No. 2,052,221

The plaintiffs complaining of the herein named defendants allege:

I.

That the plaintiff William J. Dubil, a resident of Turlock, County of Stanislaus, State of California, is the inventor of the Method of Preparing Fresh Meat covered by U.S. Patent No. 2,052,221, hereinafter referred to as the patent in suit, and the said Dubil is the owner of an undivided one-half ($\frac{1}{2}$) interest in and to the entire right, title and interest of the patent in suit. That the plaintiff Edward J. Hubik, a resident of North Long Beach, County of Los Angeles, State of California, is the owner of the other undivided one-half ($\frac{1}{2}$) interest in and to the patent in suit, as shown by an instrument of assignment duly recorded in the United [86] States Patent Office prior to the issuance of said patent and as shown upon the face of said patent.

II.

That on August 25, 1936, United States Letters Patent No. 2,052,221 were duly and legally issued to the plaintiffs Dubil and Hubik for an invention in Method of Preparing Fresh Meat; and since that date plaintiffs Dubil and Hubik have been and still are the owners of the said Letters Patent.

III.

That the plaintiff Earl F. Shores, a resident of Los Angeles, County of Los Angeles, State of California, who is and has been doing business under the fictitious firm name of Chip Steak Company of Los Angeles, California, has the exclusive right to practice the method covered by said patent, throughout the County of Los Angeles, State of California, except the cities of Long Beach and Pomona, and except that territory which is bounded on the north by Slauson Avenue, on the south by Century Boulevard, on the west by Santa Fe Boulevard, and on the east by Atlantic Boulevard, the latter bounded territory lying wholly within the cities of Huntington Park and South Gate, in the County of Los Angeles, State of California. The County of Los Angeles, in the State of California (with the foregoing exceptions), is hereinafter referred to as said territory.

IV.

That, upon information and belief, the above-named defendants are citizens of California, and residents of the County of Los Angeles, State of California, and are carrying on a business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co. That the true names of the defendants John Doe, Jane Doe and John Doe Co., are unknown to the plaintiffs at this time, but leave of court is requested to substitute their true names when ascertained by the plaintiffs. [87]

V.

That this Honorable Court has jurisdiction of the cause of action herein, as the same is a suit in equity arising under the patent laws of the United States.

VI.

That each of the defendants has been and is infringing said Letters Patent in said territory by preparing slices of fresh meat in accordance with the patented invention, and will continue to do so unless enjoined by this Court.

VII.

That the plaintiffs have placed the number of the patent in suit on sheets of paper separating slices of fresh meat prepared under the patent in suit when such slices have been publicly offered for sale, and have given written notice to the defendants of their said infringement.

For a Second, Further and Additional Cause of Action Against the Defendants, the Plaintiffs Allege:

VIII.

That the plaintiff Hubik originally adopted and used the trade-mark "Chip Steak" and registered same in the office of the Secretary of the State of California, at Sacramento, California, on September 14, 1936, Registration No. 20,515, and ever since such date notice of registration thereof has appeared on the labels used successively by the plaintiffs

Hubik and Shores, and each of them in said territory. That continuously since 1938, except for a period during the last war, when meat became very scarce, and continuously from the first part of 1946 to the present time, said periods being hereinafter referred to as such times, the plaintiff Shores has sold very thinly sliced, fresh meat molded in a round shape, with six (6) of such slices laid one upon another or laminated, to form a steak, hereinafter referred to as said laminated steaks. That the [88] labels used by the plaintiff Shores during such times, in connection with the sale in said territory of such thinly sliced, fresh meat, prepared in accordance with the method covered by the patent in suit, has consisted of waxed paper sheets bearing the trade-mark "Chip Steaks," with the trade-mark "Chip Steaks" appearing on said labels in a curve or arch adjacent a prominent and central picture of the head of a beef animal. The plaintiff Shores has during such times used said labels in said territory by placing same between said laminated steaks of very thinly sliced, fresh meat, produced in accordance with the patent in suit, by selling said laminated steaks, so labeled, in said territory. That by reason of the competent and efficient manner in which the plaintiff Shores has during such times conducted and is now conducting his said business, and by reason of the extensive advertising of said laminated steaks and selling same under the trade-mark "Chip Steaks," and by reason of the good will that has been built up during such times,

the said laminated steaks, so labeled, have come to be associated in said territory with the plaintiff Shores, in the mind of the public.

IX.

That since February or March, 1948, the defendants have been and are selling very thin slices of fresh meat molded in a round shape with six (6) of such slices laid one upon another or laminated, to form a steak, hereinafter referred to as defendants' said laminated steaks. That the defendants since February or March, 1948, have been and are using in said territory, in connection with their sale of defendants' said laminated steaks, labels simulating the said labels of the plaintiff Shores. That defendants' labels contain the words "Camp Steak" arranged in a curve or arch adjacent the picture of the head of a beef animal, with the picture of the head of the animal arranged prominently and centrally of the label. That the defendants, and each of them, use said labels in the advertising of defendants' said laminated steaks by placing such labels, printed [89] on waxed paper, between defendants' said laminated steaks in the same manner as plaintiff Shores does and has done for a number of years, as stated. That the thinly sliced meat of the plaintiffs and defendants, sold in said manner and under said labels, are practically indistinguishable by the ordinary customer at the time same are offered to the public. That the use of such labels of the defendants in said territory in connection with the sale of defendants' said laminated steaks is calculated

to and will deceive the public into believing that they are buying the said laminated steaks of the plaintiff Shores when they are in fact buying the defendants' said laminated steaks, whereby irreparable injury is being done the plaintiffs, and each of them, by the actions of the defendants, and each of them, herein complained of.

X.

That the defendant Rayford Camp prior to February, 1948, acted as a salesman for the plaintiff Shores for the sale of said "Chip Steaks" to butchers and markets in the Santa Monica area, in the County of Los Angeles, State of California, which route was owned and/or controlled by the plaintiff Shores. That the list of customers serviced in said route was and is the property of the plaintiff Shores. That such list of customers was and is a confidential list. That in February or March, 1948, the defendant Rayford Camp, in violation of said rights of the plaintiff Shores in and to said list of customers, and after terminating his connection with the said plaintiff Shores, wrongfully solicited the customers included in said list in said area, whom the defendant Rayford Camp had gotten to know by selling them "Chip Steaks." That the defendant Rayford Camp on or about and since the latter date has urged, and has endeavored to induce, said customers to purchase defendants' said laminated steaks, sold under the name of "Camp Steaks," with the result that some of said former customers of "Chip Steaks" of the plaintiff Shores

ceased purchasing plaintiff Shores' said laminated steaks, sold under [90] the trade-mark "Chip Steaks," and said customers ever since have been purchasing defendants' said laminated steaks from the defendant Rayford Camp, which unfair competition on the part of the defendant Rayford Camp has done and is doing irreparable injury to the business of the plaintiff Shores.

XI.

That the plaintiffs have given the defendants due notice of the infringement upon plaintiff's said trade-mark and of defendants' unfair competition in the sale of defendants' laminated steaks and in the manner of displaying, advertising and using its mark herein complained of, but the defendants neglected and refused, continue to neglect and refuse to cease any of said acts complained of, and will continue to do so unless restrained by this court. The plaintiffs have no speedy or adequate remedy at law.

Wherefore, plaintiffs demand (a) preliminary and final injunctions against further infringement upon said patent and trademark and against further unfair competition by the defendants and those controlled by the defendants, (b) defendants' profits, (c) general damages not less than a reasonable royalty, and (d) an assessment of costs against the defendants.

/s/ C. G. STRATTON,

Attorney for Plaintiffs. [91]

State of California,
County of Los Angeles—ss.

Earl F. Shores being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Amended Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ EARL F. SHORES.

Subscribed and sworn to before me this 3rd day of March, 1949.

[Seal] /s/ VESTA NELSON,

Notary Public in and for said County and State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 11, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the above-named plaintiffs by their counsel and move to strike paragraph "M" from the Answer to Amended Complaint and Counterclaim of Defendants Rayford Camp & Co. and Rayford Camp.

As grounds therefor the plaintiffs will rely upon the annexed Points and Authorities and upon the depositions and papers in the above file.

This Motion is not made for the purpose of delay and is made in good faith.

Dated at Los Angeles, California, this 10th day of March, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Points and Authorities

The Answer to the Amended Complaint and Counterclaim of the defendants (paragraph M) alleges as a bar to maintaining the action the defense of "unclean hands." It is submitted that this doctrine is subject to strict limitation of relevancy to the cause of action. To deny a litigant his day in court because of inequitable conduct, the conduct must have infected the cause of action and must relate to the activities concerning which the complaint is made.

The alleged conduct of the plaintiff, Shores, would have no relation whatsoever to a cause of

action for infringement of a patent, infringement of a trade-mark, or for the associated unfair competition relative to the infringements.

Germco Mfg. Co. v. McClellan, 107 Cal. App. 532 (1930).

“. . . The decision of the trial court having been based entirely on the proposition that plaintiff, with unclean hands, was in a court of equity, seeking relief, certainly it was highly prejudicial to allow evidence tending to show such fact of unclean hands to come into the case on wholly immaterial and irrelevant matters. . . . In the case at bar the trial court was vested with no discretion in the matter of admitting evidence upon these immaterial and irrelevant matters tending to show ‘unclean hands’ on the part of appellant.”

Western Union Telegraph Co. v. Commercial Pacific Cable Co., 177 Cal. 577 (1918).

“. . . The maxim that ‘He who comes into a court of equity must do so with clean hands,’ has reference to the particular transaction, in which relief is sought, and not to the general morals or conduct of the person seeking such relief.”

Keystone Driller Company v. General Excavator Company, 290 U.S. 240-247, 78 L. ed. 293.

“But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary

relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication. Story, Eq. Jur. §100. Pom. Eq. Jur. §399. They apply the maxim, not by way of punishment for extraneous transgressions but upon considerations that make for the advancement of right and justice. They are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." (Underlines added.)

First Trust & Savings Bank et al. v. Iowa-Wisconsin Bridge Co., 98 F. (2d) 416, (C.C.A. 8, 1938).

"This 'clean hands doctrine' is subject to the familiar limitation that a plaintiff is not barred from relief in a court of equity unless his wrong has an immediate and necessary relation to the equity for the enforcement of which he prays. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 54 S.Ct. 146, 78 L.Ed. 293; Talbot vs. Independent Order of Owls, 8 Cir., 220 F. 660; Olsness v. Home Ins. Co., 8 Cir., 14 F. 2d 907; Trice v. Comstock, 8 Cir., 121 F. 620, 61 L.R.A. 176; Primeau v. Granfield, 2 Cir., 193 F. 911."

Receipt of copy acknowledged

[Endorsed]: Filed March 11, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for the above-named parties that the Amended Reply of Plaintiffs William J. Dubil and Edward J. Hubik to Counterclaims of Defendants shall be taken to be the reply of the last-mentioned plaintiffs to the counterclaims set forth in defendants' Answer to Amended Complaint and Counterclaim of Defendants Rayford Camp & Co., and Rayford Camp.

Dated at Los Angeles, California, this 11th day of March, 1949.

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS,

FORD HARRIS, JR.,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants.

So Ordered this 14th day of March, 1949.

/s/ LEON R. YANKWICH,

Judge of U. S. District Court.

[Endorsed]: Filed March 14, 1949. [94]

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[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties

to the above-entitled action, through their respective attorneys, as follows:

(a) Uncertified printed copies or uncertified photostatic or photographic copies of United States and foreign Letters Patent may be offered and received in evidence, subject to all legal objections other than that such copies are secondary evidence, with the same force and effect as the originals, and that the printed dates of application and issuance of such Letters Patent shall be taken as *prima facie* evidence of the actual dates thereof respectively, subject to correction at any time for errors; and

(b) Photostatic or photographic copies of written documents may be offered and received in evidence in lieu of the originals thereof, but subject to all legal objections other than that such copies are secondary evidence, [95] provided that the party offering the same shall produce the originals thereof and permit the other party to compare the copy offered with the original thereof.

Dated At: Los Angeles, California, this 16th day of March, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS,

By /s/ FORD HARRIS, JR.,
Attorneys for Defendants.

[Endorsed]: Filed March 17, 1949. [96]

[Title of District Court and Cause.]

MOTION TO INSPECT

Come now the above-named plaintiffs and move that this Honorable Court enter an Order under Rule 34 of the Rules of Civil Procedure, to permit the entry upon defendants' place of business at 11871 Florence Avenue, Culver City, California, for the purpose of inspecting, measuring, surveying or photographing the carrying out of the process or method carried on by the defendants as described in the defendant Rayford Camp's deposition taken on January 18, 1949, page 29, lines 6 to 14 thereof, and for the purpose of testing the refrigeration equipment used by the defendants in the tempering room, and as grounds therefor the plaintiffs show the following:

1. The patent in suit is upon the method or process of preparing thinly sliced fresh meat.

2. The plaintiffs have no way of knowing the process carried out by the defendants, which is charged to infringe, other than by an inspection of the defendants' plant carrying out such process. The only information the plaintiffs have at the present time is the unsupported statement of the defendant Rayford Camp himself.

3. The defendants invited the plaintiffs to visit said plant of the defendants for the purpose of inspecting the process employed by the defendants which is charged to infringe in this case, and thereafter, prior to the appointed time, such invitation

was withdrawn by the defendants, which is stated in the following words in the deposition of the defendant Rayford Camp, taken on January 27, 1949, beginning on page 8, line 14, and ending on page 9, line 2:

“Q. I wanted to place in the record the fact that at the close of your deposition last week your counsel invited the plaintiffs and plaintiffs’ counsel to come to your plant at 10:30 a.m. to witness the way you make your steaks. You recall that, I take it?

“A. I believe that there was a discussion of that nature.

“Q. And such an invitation was made?

“A. I don’t recall.

Mr. Harris: I will stipulate that it was made.

Mr. Stratton: I will accept the stipulation.

“Q. Then I believe you are aware that the invitation was withdrawn?

Mr. Harris: I will so stipulate.

Mr. Stratton: I accept the stipulation.”

The only excuse given by defendant’s counsel for not agreeing to such inspection is that the defendant claims to have some secret matters at his plant, but that is not sufficient excuse to prevent plaintiffs seeing the process involved here.

This Motion is not made for the purpose of delay and is made in good faith.

At the hearing on this Motion the plaintiffs will rely upon the annexed Points and Authorities, and

upon the depositions and the papers in the file in the above case.

Dated at Los Angeles, California, this 10th day of March, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Points and Authorities

The plaintiffs are entitled to inspect the place of business of the defendants and witness the carrying on of the process charged to infringe.

- Rule 34, Rules of Civil Procedure
- Corbett v. Columbia Transportation Co.,
5 F.R.D. 217 (U.S. Dist. Ct., W.D. N.Y.
1946)
- Farr v. Delaware, Lackawanna & Western
R. Co., 8 F.R.S. 34.25 (U.S. Dist. Ct., S.D.
N.Y. 1944)
- Mulligan v Eastern Steamship Lines, Inc.
6 F.R.D. 601 (U.S. Dist. Ct., S.D. N.Y.,
1946)

Receipt of Copy acknowledged.

[Endorsed]: Filed March 14, 1949.

[Title of District Court and Cause.]

ORDER RE INSPECTION OF PLANTS

This matter came on to be heard upon the plaintiffs' Motion to Inspect the defendants' place of business, and after considering the defendants'

Memorandum in opposition thereto, and after hearing the arguments of counsel, the Court being advised in the premises,

Hereby Orders that the plaintiffs' counsel, C. G. Stratton, a Notary Public, and not more than two other persons (neither of whom shall be one of the plaintiffs in this case) shall be given access to the defendants' place of business at 11871 Florence Avenue, Culver City, California, on Wednesday, March 23, 1949, at 2:00 p.m., at which time the defendant Rayford Camp, or one or more employees at his direction, will demonstrate for such parties the process charged to infringe the patent in suit, and more particularly the [97] process described by the defendant Rayford Camp on page 29, lines 6 to 14 thereof, of his deposition taken on January 18, 1949; that plaintiffs' said representatives may make all necessary inspection and temperature tests on said days incidental to the carrying out of said tests; and that the plaintiffs' said counsel may designate a representative of some testing concern to call at defendants' said place of business at 4:30 p.m. Monday and again on Tuesday, March 21 and 22, 1949, for the purpose of placing and sealing in different places in the refrigerators at the defendants' said place of business, including attaching and sealing thermometers to the molds containing the meat to be sliced by the defendants on Wednesday, March 23, in carrying out the process as aforesaid; and that the defendants will indicate to such representative on said visits which molds are to be employed in the said tests.

That the defendants' counsel, Ford Harris, Jr., a Notary Public, and not more than two other persons (neither of whom shall be the defendant Rayford Camp) shall be given access to the plaintiff Shores' place of business at 4151 South Main Street, Los Angeles, California, on Thursday, March 24, 1949, at 2:00 p.m. at which time the plaintiff Shores, or one or more employees at his direction, will demonstrate for such parties the process carried on under the patent in suit and which the plaintiffs will rely upon as showing commercial success of the patent in suit; that the defendants' said representatives may make all necessary inspection and temperature tests on said days incidental to the carrying out of said tests; and that the defendants' said counsel may designate a representative of some testing concern to call at plaintiff Shores' said place of business at 4:30 p.m. Tuesday and again on Wednesday, March 22 and 23, 1949, for the purpose of placing and sealing in different places in the refrigerators at the plaintiff Shores' said place of business, including attaching and sealing thermometers to the molds containing the meat to be sliced by the defendants on [98] Thursday, March 24, 1949, in carrying out the plaintiff Shores' process as aforesaid; and that the plaintiff Shores will indicate to such representative on said visits which molds are to be employed in the said tests.

That the plaintiff Shores may charge the defendants, and the defendants may charge the plaintiffs the following costs in connection with said tests:

the actual cost of any additional labor necessary for conducting said tests and the cost of actual materials used. No attorney's fees, time of the parties to this suit, overhead expense, rent, depreciation, power, salaries (other than the time of the persons actually doing the work) nor any machinery expense whatsoever shall be charged. The party desiring to file such a cost bill shall do so prior to the trial of this case, to be heard by the undersigned at some convenient time thereafter, which shall itemize the name of the employee doing the work, giving the actual time spent in hours and minutes and stating the exact character of the work done, and the usual salary paid such party for said length of time. The materials charged shall not be more than six (6) logs of meat of customary size sliced by the parties hereto, the amount to be sliced shall be determined by the party to be charged for such expense.

Done In Open Court, this 18th day of March, 1949.

/s/ LEON R. YANKWICH,

U. S. District Judge.

Approved As To Form:

/s/ C. G. STRATTON,

Attorney for Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS,

FORD HARRIS, JR.,

By /s/ FORD HARRIS, JR.,

Attorneys for Defendants.

[Endorsed]: Filed March 18, 1949. [99]

[Title of District Court and Cause.]

DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendants answer plaintiffs' interrogatories as follows:

1 (a). No.

1 (b). No.

2 (a). The file-wrapper references cited by the Patent Office during the prosecution of the application for the patent in suit may also be used at the trial.

2 (b). To establish invalidity of the patent in suit, defendants may also rely upon the testimony of the following witnesses: [100]

Name	Address
Rayford Camp	11871 Florence Avenue, Culver City, California
Al Rumley	Las Vegas, Nevada
Leonard Frederick	1334 No. Vine Street, Hollywood, California
Larry Frederick	1334 No. Vine Street, Hollywood, California
William Frederick	1334 No. Vine Street, Hollywood, California
John Badavini	Unknown
Louis Bryant	Unknown
Gordon Wells	Unknown
Robert Pierson	Unknown
Solomon Shapiro	Unknown
S. D. Baird	Inglewood, California

Other possible witnesses are at this time unknown.

2 (c) Claim to Trade-Mark of William Frederick, filed with the Secretary of State of California on September 11, 1935, on the name "Strat-O-Fry Steak"; claim to Trade-Mark of William Frederick, filed with the Secretary of State of California on September 11, 1935, on the name "Strat-O-Steak"; advertisements appearing in the Hollywood Citizen News Newspaper in 1934 and 1935, advertising the laminated steak products made and sold by said Fredericks.

/s/ RAYFORD CAMP,

Rayford Camp, individually and doing business as
Rayford Camp & Co.

Subscribed and sworn to before me this 15th day
of March, 1949.

[Seal] /s/ JAMES HOGAN,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Sept. 16, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed March 18, 1949. [101]

At a stated term, to wit: The February Term.
A.D. 1949, of the District Court of the United States
of America, within and for the Central Division of
the Southern District of California, held at the
Court Room thereof, in the City of Los Angeles on
Monday the 28th day of March in the year of our

Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., George M. Breslin, and W. L. Kern, Esqs., appearing as counsel for defendants;

Attorney Stratton makes a statement; Plf's Ex. 1 is admitted in evidence, and Plfs' Ex. 2 and 3 are marked for ident.

At 10:54 a.m. court recesses for ten minutes. At 11:05 a.m. court reconvenes herein and all being present as before, Attorney Stratton resumes opening statement to the Court.

At 11:06 a.m., Attorney Harris makes opening statement to the Court for defendants.

At 11:37 a.m., Lee Allen Schmidt is called, sworn, and testifies for plaintiff.

At noon court recesses to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, Attorney Stratton makes a statement.

At 2:03 p.m. Otis M. Gunderson is called, sworn, and testifies for plaintiff.

At 2:12 p.m. Rayford Camp, defendant, is called under Rule 43-B FRCP as a witness for plaintiffs and is cross-examined by Attorney Stratton. Plf's Ex. 4 is marked for ident.

At 3:20 p.m. court recesses for ten minutes. At 3:33 p.m. court reconvenes herein and all being

present as before, defendant Rayford Camp resumes the stand and testifies on further cross-examination by Attorney Stratton.

At 4:04 p.m. Court declares a recess in this trial until 11 a.m. March 29, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 29th day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., W. L. Kern, Esq., and Geo. M. Breslin, Esq., appearing as counsel for defendants; and Thos. B. Goodwill, Reporter, being present and reporting these proceedings;

Rayford Camp, heretofore sworn, resumes the stand and testifies further on cross-examination by Attorney Stratton under Rule 43-B FRCP. Plf's Ex. 5 and 6 are marked for ident., and later admitted in evidence. At noon court recesses to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, Court orders that the trial proceed.

Rayford Camp resumes the stand and testifies further on examination by Attorney Stratton under Rule 43-B, FRCP. Plf's Ex. 7, 8, 9, and 10 are marked for ident. and later admitted in evidence. At 2:55 p.m. Edward Munyon is called, sworn, and testifies for plaintiff. At 3:20 p.m. court recesses for ten minutes. At 3:32 p.m. court reconvenes herein and all being present as before, Court orders trial proceed. Plf's Ex. 11 is marked for ident.

At 3:55 p.m. Court declares a recess in the trial of this cause until 10 a.m., March 30, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 30th day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Tile of Cause.]

For further Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., Warren L. Kern, and Geo. M. Breslin, Esqs, appearing as counsel for defendants; at 10:12 a.m. court reconvenes herein;

Statements are made to the Court respectively by Attorneys Stratton and Harris. Robert M. Bonus,

at 10:13 a.m., is called, sworn, and testifies for plaintiff. At 11:12 a.m. court recesses for ten minutes.

At 11:21 a.m. court reconvenes herein and all being present as before, Robert M. Bonus resumes the stand and testifies further. At 12:03 p.m. court recesses to 2 p.m.

At 2 p.m. court reconvenes herein and all being present as before, Robert M. Bonus resumes the stand and testifies further.

At 2:56 p.m. Ronald Wellington Arnold is called, sworn, and testifies for plaintiff.

At 3:58 p.m. Court declares a recess in the trial of this cause until 10 a.m., March 31, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 31st day of March in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., W. L. Kern, and G. M. Breslin, Esqs, appearing as counsel for defendants; Court declares a recess herein until 11 a.m. today.

At 11 a.m. court reconvenes herein and all being present as before, Attorney Stratton makes a statement to the Court.

Donald M. Urton, at 11:07 a.m., is called, sworn, and testifies for plaintiff. Plf's Ex. 12 and 13 are marked for ident., and later admitted in evidence.

At noon court recesses to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, Donald M. Urton resumes the stand and testifies further. Deft's Ex. A is marked for ident.

Hal Gross, at 2:18 p.m., is called, sworn, and testifies for plaintiff.

Wm. T. Carpenter, at 2:30 p.m., is called, sworn, and testifies for plaintiff. Plf's Ex. 14 and 15 are marked for ident. and later admitted in evidence.

At 2:54 p.m. court recesses for ten minutes. Court reconvenes herein and all being present as before, Wm. T. Carpenter resumes the stand and testifies further.

Edw. J. Hubik, at 3:49 p.m., is called, sworn, and testifies for plaintiff. Plf's Ex. 16 is marked for ident. and later admitted in evidence.

At 4:02 p.m., Court declares a recess in the trial of this cause to 10 a.m., April 1, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 1st day of April in the year of our Lord

one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., Warren L. Kern, and George M. Breslin, Esqs, appearing as counsel for defendants; at 10:06 a.m. Attorney Stratton makes a statement. Edw. J. Hubik, at 10:12 a.m., heretofore sworn, resumes the stand and testifies further. At 10:42 a.m. Earl F. Shores is called, sworn, and testifies for plaintiffs. Plfs' Ex. 2 and 17 are marked for ident., and later admitted in evidence. At 11:09 a.m. court recesses for ten minutes.

At 11:22 a.m. court reconvenes herein and all being present as before, Earl F. Shores testifies further. Plfs' Ex. 18, 19, 20, 21, and 22, respectively, are admitted in evidence. At 12:05 p.m. court recesses to 2 p.m.

At 2 p.m. court reconvenes herein and all being present as before, Earl F. Shores testifies further.

Albert M. Rumley is called out of order at 2:13 p.m. and testifies for defendant. Defts' Ex. B, C, and D are marked for ident.

At 3:19 p.m. court recesses for ten minutes. At 3:30 p.m. court reconvenes herein and all being present as before, Earl F. Shores testifies further. Plfs' Ex. 23 and 24 are admitted in evidence.

At 4 p.m. Court declares a recess in this trial until 10 a.m., April 4, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 4th day of April in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., W. L. Kern, and Geo. M. Breslin, Esqs, appearing as counsel for defendants; Plfs' Ex. 11 for ident. is ordered withdrawn by counsel for defendants.

Earl F. Shores, heretofore sworn, resumes the stand at 10 a.m. Plfs' Ex. 25 is marked for ident. and later admitted in evidence.

Arthur B. Lewis, at 10:43 a.m., is called, sworn, and testifies for plaintiff.

At 10:50 a.m. court recesses for ten minutes. At 11:03 a.m. court reconvenes herein and all being present as before, Witness Lewis resumes the stand and testifies further. At 11:56 a.m. court recesses to 2 p.m. today.

At 2:10 p.m. court reconvenes herein and all being present as before, except Attorney Breslin, who is absent, Court orders trial proceed;

Arthur B. Lewis resumes the stand and testifies further.

Attorney Stratton reads deposition of Wm H. Sloan into the record. Plfs' Ex. 26 to 30 incl. are marked for ident. and later admitted in evidence.

Attorney Stratton having presented for filing a petition for an order to show cause why the defendant Rayford Camp should not be held in contempt of Court together with order for signature of the Court, the Court declines to sign said order. At 4:03 p.m. plaintiffs rest.

Court orders cause continued to 10 a.m., April 5, 1949.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' INTERROGATORIES TO WILLIAM H. SLOAN

Pursuant to Rule 32 C(3) of the Federal Rules of Civil Procedure, defendants hereby object to the following written interrogatories propounded by the plaintiffs herein to William H. Sloan, for the reasons hereinafter stated:

A. Interrogatories 4, 5, and 6.

(a) There is no proper foundation for the question.

(b) The question is not relevant to any issues involved in this action.

B. Interrogatories 7 and 8.

(a) There is no proper foundation for the question.

(b) The question calls for an answer which is hearsay.

(c) The question is not relevant to any issues involved in this action.

(d) The question calls for an answer which is not the best evidence of the facts which are sought.

Dated: At Los Angeles, California, this 25 day of February, 1949.

HARRIS, KIECH, FOSTER &
HARRIS,
FORD HARRIS, JR.,
By /s/ FORD HARRIS, JR.,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 4, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California held at the Court Room thereof, in the City of Los Angeles on Tuesday the 5th day of April in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further court trial; C. G. Stratton, Esq., ap-

pearing as counsel for plaintiffs; Ford Harris, Jr., W. L. Kern, and Geo. M. Breslin, Esqs., appearing as counsel for defendants;

Counsel stipulate that the meat exhibits in this case may be destroyed, said exhibits being Plfs' Ex. 4, 7, 8, 9, 17, 18, 19, 20, 21, and 22, and the Court so orders.

At 10:05 a.m. Attorney Harris moves to dismiss the case and argues in support thereof. At 10:33 a.m. Attorney Stratton argues in reply. Attorney Harris argues further. The Court makes a statement and denies said motion of defendant to dismiss.

At 11:04 a.m. court recesses for ten minutes. At 11:25 a.m. court reconvenes herein and all being present as before, Court orders trial proceed.

Defts' Ex. A, E, and F, and F-1, F-2, F-3, F-4, F-5, and F-6, respectively, are admitted in evidence. Defts' Ex. G and H are marked for ident. and later admitted in evidence.

Rayford Camp, heretofore sworn, is called as a witness for defendants and testifies on direct examination by Attorney Harris.

At noon court recesses to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, Court orders trial proceed. Marie Zellner, Reporter, is present and reports the proceedings.

Rayford Camp resumes the stand and testifies further, and is withdrawn.

At 2:50 p.m. Bernard V. Merge is called, sworn,

and testifies for defendants. Defts' Ex. I, J, and K are marked for ident. and later admitted in evidence. Defts' Ex. B, C, and D, heretofore marked for ident., are admitted in evidence.

At 3:05 p.m. court recesses for ten minutes. At 3:28 p.m. court reconvenes herein and all being present as before, Defts' Ex. L is admitted in evidence.

Rayford Camp resumes the stand and testifies further, on examination by Attorney Harris. Defts' Ex. M, N, and O, are marked for ident., and O is admitted in evidence.

At 3:54 p.m. Court declares a recess in the trial of this cause until 10 a.m., April 6, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 6th day of April in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further court trial; C. G. Stratton, Esq., appearing as counsel for plaintiff; Ford Harris, Jr., W. L. Kern, and Geo. M. Breslin, Esqs., appearing

as counsel for defendants; at 10:06 a.m. court reconvenes herein;

Rayford Camp, heretofore sworn, testifies further, Plfs' Ex. 31 is admitted in evidence, and Plfs' Ex. 32 is marked for ident. and later admitted in evidence. At 11:13 a.m. court recesses for ten minutes.

At 11:25 a.m. court reconvenes herein and all being present as before, Rayford Camp testifies further.

At 11:44 a.m. F. M. Mushrush is called, sworn, and testifies for defendants.

At 12:07 p.m. court recesses to 2 p.m. At 2 p.m. court reconvenes herein and all being present as before, Court orders trial proceed.

Wm. Howard Frederick, at 2:02 p.m., is called, sworn, and testifies for defendants, and Defts' Ex. P is marked for ident. and later admitted in evidence, and Plfs' Ex. 33 is admitted in evidence.

Lawrence E. Frederick, at 2:38 p.m., is called, sworn, and testifies for defendants. At 3:25 p.m. court recesses for ten minutes.

At 3:36 p.m. court reconvenes herein and all being present as before, F. M. Mushrush, heretofore sworn, testifies further. Defts' Ex. M and N, for ident., are admitted into evidence, and Defts' Ex. Q is marked for ident.

At 3:59 p.m. Court declares a recess in this trial until 10 a.m., April 7, 1949.

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 7th day of April in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Charles C. Cavanah,
District Judge.

[Title of Cause.]

For further Court trial; C. G. Stratton, Esq., appearing as counsel for plaintiffs; Ford Harris, Jr., and W. L. Kern, Esqs., appearing as counsel for defendants;

F. M. Mushrush, heretofore sworn, at 10 a.m., resumes the stand and testifies further. Plfs' Ex. 34 is admitted in evidence.

At 11:18 a.m. court recesses for ten minutes. At 11:28 a.m. court reconvenes herein and all being present as before, Witness Mushrush testifies further.

Earl F. Shores, heretofore sworn, is called under Rule 43, FRCP, and testifies on cross-examination by Attorney Harris.

Rayford Camp, heretofore sworn, is recalled at 11:33 a.m. and testifies on direct examination by Attorney Harris, Jr.

Defts' Ex. R is marked for ident., and Defts' Ex. R, S, T, and U are admitted in evidence.

Edw. J. Hubick, heretofore sworn, is recalled at 11:38 a.m., under Rule 43-B FRCP, and testifies on examination by Attorneys Harris and Stratton,

respectively. Plfs' Ex. 35 and 36 are marked for ident. and later admitted in evidence. At 11:50 a.m. defendants rest.

Witness Robert M. Bonus, heretofore sworn, is called in rebuttal and testifies for plaintiffs on direct examination by Attorney Stratton.

At noon court recesses to 2 p.m. today for further trial.

At 2 p.m. court reconvenes herein and all being present as before, Attorney Breslin, of counsel for defendants, still being absent;

Witness Bonus resumes the stand and testifies further on cross-examination by Attorney Harris.

Plaintiffs rest in rebuttal at 2:03 p.m., and there is no surrebuttal. Attorney Stratton commences his argument to the Court at 2:03 p.m.

At 2:55 p.m. Court declares a recess for ten minutes.

At 3:04 p.m. court reconvenes herein and all being present as before, Attorney Stratton argues further.

At 3:05 p.m. Attorney Harris commences his argument to the Court, and closes at 3:50 p.m.

At 3:50 p.m. Attorney Stratton resumes his argument for plaintiff in reply to the Court, and the Court orders that each side have ten days to file memo., and seven days thereafter to answer opposing memorandum; in other words, all briefs are to be filed by April 25, 1949, and that the case then will stand submitted.

In the United States District Court, Southern
District of California, Central Division
Civil No. 8649-Y

WILLIAM J. DUBIL, EDWARD J. HUBIK, and
EARL F. SHORES,

Plaintiffs,

vs.

RAYFORD CAMP & COMPANY, RAYFORD
CAMP, JOHN DOE, JANE DOE, and JOHN
DOE CO.,

Defendants.

OPINION

Cavanah, District Judge.

In the present action the plaintiffs assert that the plaintiff William J. Dubil is the inventor of the Method of Preparing Fresh Meat covered in the patent in suit, and that the plaintiffs Edward J. Hubik and Earl F. Shores are now the owners thereof. That the plaintiff Earl F. Shores, a resident of Los Angeles County, State of California, doing business under the fictitious firm name of "Chip Steak Company" of Los Angeles, California, has the exclusive right to practice the method covered by the patent, throughout the County of Los Angeles, except the cities of Long Beach and Pomona and certain other alleged territory.

That the defendants are carrying on a business in Los Angeles County under the fictitious name of Rayford Camp & Company, and are now and have been infringing said Letters Patent in said territory

by preparing slices of fresh meat in accordance with the patented invention, and will continue to do so unless enjoined by this court. That the plaintiffs have placed the number of the patent in suit on sheets of paper separating slices of fresh meat prepared under the patent when such slices have been publicly offered for sale and have given written notice to the defendants of their [112] infringement.

For a second and further cause of action, the plaintiffs allege, that the plaintiff Hubik originally adopted and used the trade-mark "Chip Steak" and registered same in the office of the Secretary of State of California on September 14, 1936. That continuously since 1938, except for the period during the last war, and from the first part of 1946 to the present time, the plaintiff Shores has sold very thinly sliced, fresh meat, molded in a round shape, with six of such slices laid one upon the other to form a steak, and the method covered by the patent has consisted of waxed paper sheets bearing the trade-mark "Chip Steaks," appearing in a curve adjacent a central picture of a head of a beef animal.

That since February or March, 1948, the defendants have been and are selling very thin slices of fresh meat molded in a round shape with six of such slices laid one upon the other to form a steak, and are using labels simulating the labels of the plaintiff Shores, and containing the words "Camp Steak" arranged in an arch adjacent to the picture of the head of a beef animal, and are using the labels in

the advertising of defendants' said steaks, and to deceive the public in believing that they are buying the steaks of the plaintiff Shores.

The defendants answer and place in issue the material allegations of plaintiffs' complaint and assert (a) that the Letters Patent in suit are invalid and have not been infringed by the defendants; (b) that the alleged trade-mark "Chip Steaks" is invalid; (c) that the defendants have not been guilty of any acts of unfair competition or trade-mark infringement; and (d) urge recovery upon their alleged counterclaims.

Under the issues thus presented, and recognizing the general rule that in this class of cases the burden of proof to establish the allegations of plaintiffs' complaint rests upon the plaintiffs by a preponderance of the evidence that is clear [113] and convincing, we then approach an analysis of the evidence in which there appears to be considerable repetition, confusion, and a keen conflict which presents to the mind a lack of clearness and confusion as to the method adopted by the parties in adopting the process when in preparing the meat for use and sale. But the first question to be considered is, was the patent in suit valid for want of invention as the defendants urge. The plaintiff was not the original and first inventor or discoverer of the material part of the thing patented as it had been in public use or on sale in this country for more than one year before his application for a patent, and is indefinite and will not work.

The patent in suit was issued on August 25, 1936,

and the process to be patentable must possess novelty. 35 U.S.C.A., sec. 31, p. 186. From a study of the prior art patents in evidence, each of the steps of the process described and claimed in the patent in suit and the combination of such process steps has been heretofore taught by the disclosures of the prior arts disclosed by the patents to Taylor, Nos. 1,864,284, and 1,864,285, and patents to McKee Nos. 2,140,162 and 2,137,897.

The patent office was misled and did not consider the prior art patents of the McKee and Taylor patents in granting the application for the patent in suit and, due to such failure, is of particular significance with respect to the presumption of validity which normally would aid in upholding it is destroyed. *Hann v. Venetian Blind Corporation*, 21 Fed. Supp. 913; *Mettler v. Peabody Engineering Corp.*, 77 Fed. 2d 56 (C.C. App. 9th).

The process of preparing meat by the specific steps of the patent in suit is old in the art, therefore, invention is not shown. The Supreme Court has said that, “. . . To claim the merit of invention the patented process must itself possess novelty. The application of an old process to a new and closely analogous [114] subject matter, plainly indicated by the prior art as an appropriate subject of the process, is no invention.” *Paramount Publix Corporation v. American Tri-Ergon Corporation*, 294 U.S. 464, 79 L.ed. 997; *Dow Chemical Co. v. Halliburton, etc. Co.*, 324 U.S. 320, 89 L.ed. 973; *Cuno Engineering Corporation v. Automatic Devices Corporation*, 314 U.S. 84, 86 L.ed. 58.

Invention is not shown because the patentee in suit specified in his claims exact temperature and time limitations required in the performance of his steps. For example, the slicing temperature range of 30° to 32°F. is broadly covered in the disclosure of the McKee patent 2,137,897, which specifies 0° to 32°F. The greater always includes the lesser. *Newton Steel Co. v. Surface Combustion Co.*, 75 Fed. 2d 305. Commercial success alone is not sufficient to validate a patent. *Heath v. Frankel*, 153 Fed. 2d 369; *Standard Parts, Inc. v. Toledo Pressed Steel Co.*, 93 Fed. 2d 336; *Weidhaas v. Loew's, Inc.*, 125 Fed. 2d 544, in which certiorari denied, 316 U.S. 684, 86 L.ed. 1757..

The evidence discloses that prior uses of the process described in the patent in suit were made by the defendant and others in the preparation of "Strato-Steaks." The statute requires that the alleged invention be not known or used by others before the patentees' invention or discovery thereof. Title 35 U.S.C.A., sec. 31, p. 186; *Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 390, 70 L.ed. 651; *Barber v. Otis Motor Sales Co.*, 271 Fed. 171, cert. den. 256 U.S. 693, 65 L.ed. 1175; *Torrey v. Hancock*, 184 Fed. 61; *National Mach. Corp. v. Benthall Mach. Co., Inc.*, 241 Fed. 72; *Columbus Dental Mfg. Co. v. Ideal Interchangeable Tooth Co., Inc.*, 294 Fed. 422.

The claims in the patent in suit are broader and more indefinite than the alleged invention, as its claims specify [115] in performing the process that the meat shall be thawed to a temperature of ap-

proximately 30° to 32°F. and then sliced into thin slices. This temperature range is contended by plaintiffs to be highly critical, yet, the evidence establishes that the process could not be performed within that entire temperature range. The alleged process is for slicing meat within a different temperature range than the 30° to 32°F. Where the claims, as here, do not specify a complete operative range of conditions but require the user to experiment, the claims are indefinite resulting in the patent becoming invalid. *Tucker v. Spalding*, 80 U.S. 453, 20 L.ed. 515; *Merrill v. Yeomans*, 94 U.S. 573, 24 L.ed. 235; *Standard Oil Co., etc., v. Tide Water Associated Oil Co.*, 154 Fed. 2d 579; *Eisenstein v. Fibiger*, 160 Fed. 686.

The evidence discloses that the patent in suit is invalid for the reasons thus stated as it is fully anticipated by the prior arts, there is no invention disclosed. There was prior public use, that the claims therein are indefinite and broader than the alleged invention, and were issued on misrepresentations to the United States Patent Office.

The conclusion having been reached that the patent in suit is invalid, we need not consider the question of whether defendants infringed it. *Cuno Engineering Corporation v. Automatic Devices Corp.*, 314 U.S. 84, 86 L.ed. 58.

The mere fact that a consent decree of this court, upholding the validity of the patent in suit is not controlling in the present action, as the defenses here were not before the court with respect to

invention, prior art and the other contentions here made by the defendants. *Murray Ohio Mfg. Co. v. E. C. Brown Co.*, 124 Fed. 2d 426, 428; *Warner Bros. Co. v. American Lady Corset Co.*, 136 Fed. 2d 93.

The further contention of the plaintiffs that there was infringement of the California registered trade-mark and unfair competition in the sale by the defendants of their product: [116] The evidence fails to establish this claim. The trade-mark "Chip Steaks" is merely descriptive and is known to the trade by that name, and the plaintiffs cannot have all exclusive rights to it. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 83 L.ed. 73. The trade-mark was improperly registered in the State of California, Sections 14242, 14246, California Code. Further the evidence here does not support the claim of unfair competition in the sale of Camp Steaks. There does not seem to be confusion between plaintiffs' and defendants' goods in the sale thereof, and the defendants have not engaged in any acts of unfair competition or infringement of the alleged trade-mark.

The further conclusion is reached under the evidence that the defendants are not entitled to recover from the plaintiffs upon their counterclaim as the evidence is conflicting and confusing.

Decree will be entered for the defendants and against the plaintiffs that plaintiffs are not entitled to recover against the defendants, and that the defendants are not entitled to recover on their counter-

claims; and that defendants recover the sum of \$20,000.00 as attorney fees and costs against the plaintiffs.

Counsel for defendants prepare Findings and Decree.

[Endorsed]: Filed May 23, 1949. [117]

[Title of District Court and Cause.]

PETITION BY THE PLAINTIFFS

To the Honorable Charles C. Cavanah, United States District Judge:

The undersigned plaintiffs respectfully submit that the intent of Congress in the patent statute allowing for attorney's fees, is to restrict such an award to those cases which are not brought or conducted in good faith or with a sound basis.

It is believed that it would be an extremely dangerous precedent and would be a serious deterrent to industrial and commercial advancement and development of our country if the courts should allow extremely large and penalizing attorney's fees against a patentee who in good faith seeks a determination of what he honestly believes to be an infringement of a patent that is *prima facie* valid, and especially where the validity of that patent has been generally acquiesced in for years. Such potential award would, in most cases, prevent an ordinary patentee from asserting his legal right accorded him by his patent for fear of bearing a burden of

an extreme penalty in the form of attorney's fees, in event of failure. Patent litigation would become a "rich man's" privilege.

Inventors who in good faith, and in reliance upon the patent laws, expend their time and money to try to advance a certain field of human endeavor would be subject to the danger of bankruptcy if the Court should happen to declare the patent to be invalid on unexpected grounds and as a penalty assessed large attorney's fees which to the ordinary inventor is a back-breaking burden to the point of bankruptcy. A patentee should be able to resort to the courts without fear of being penalized by having very heavy attorney's fees allowed against him in case he should be honestly mistaken in his belief as to the validity of his patent.

It is respectfully submitted that attorney's fees should be allowed only in aggravated cases, similar to the practice of the courts in exercising their discretionary powers to treble damages in a patent case where the infringement of a defendant is found to be wilful and deliberate. Even despite this power in the court, it very rarely happens that treble damages are awarded, even in extreme cases.

The appearance of an infringer leaves the patentee to an election of two alternatives, (1) to permit the infringement and resulting detriment to the business, which naturally tends to decrease and/or eliminate net return, or, (2) to assert his rights based upon his patent in a court of law, with a possible heavy penalty if the patent which he thought was valid (because it was issued to him by the

United States Patent Office) is finally held to be invalid. These plaintiffs are unable to bear the burden of paying the attorney's fees awarded in this case without disastrous or near disastrous results.

The three plaintiffs in this action are typical of ordinary patentees and licensees. Dubil is a small town builder with a modest income. Hubik is a butcher in his own small meat market. Shores operates his own meat business as an individual. All three were acting in good faith and relied upon the patent and upon the recognition by others of its validity, over a number of years.

There existed honest and substantial reason to believe the patent in suit was valid, especially in view of the defendant Camp's undenied efforts to try to obtain a license under the patent in suit for \$2500.00 from the agent Carpenter, and after the war Camp trying to buy plaintiff Shores' business and license under the patent in suit.

It is believed the plaintiffs have shown their good faith in this case so that in an humble spirit they approach this Honorable Court with the respectful plea that they should not be punished for their honest opinion by being assessed what is to them an enormous and oppressive amount of attorney's fees.

WILLIAM J. DUBIL and

EDWARD J. HUBIK

By /s/ EDWARD J. HUBIK

/s/ EARL F. SHORES

Receipt of Copy acknowledged.

[Endorsed]: Filed July 22, 1949.

[Title of District Court and Cause.]

DONALD C. RUSSELL AFFIDAVIT RE
PRIOR DECISIONS OF THIS COURT

State of California,

County of Los Angeles—ss.

Donald C. Russell, of the aforesaid County and State, being first duly sworn, on oath deposes and says that he is an attorney-at-law, practicing in Los Angeles, California, and that he has made an investigation of what he believes to be all the patent cases filed since August 1, 1946 (the date that 35 U.S.C.A. Sec. 70, relating to attorney's fees in patent infringement cases first went into effect), by the United States District Court, for the Southern District of California, Central Division, with reference to judgments for attorney's fees, apart from the case of *Dubil v. Camp*, No. 8649-Y.

The following is a list of patent cases relating to attorney's [139] fees that affiant was able to compile by checking active and closed dockets of said Court:

- (a) *Brown v. McGill* No. 5470-BH
Trial appeared to be two days. Held for plaintiff. Each party bore expenses.
- (b) *Macpherson v. Radcliff* No. 5484-PH
Held for plaintiff. No attorneys' fees.
- (c) *Lasar v. Kent Engineering Co.*
No. 5549-WM
Trial more than one week. Held for plaintiff. Attorneys' fees not awarded.

- (d) Gibbs v. Hicks dba. Skill-A-Line
No. 5565-W
Injunction decreed. Attorney's fees not awarded.
- (e) Marvin Landplane Co. v. Dawson Mfg. Co.
No. 5785-WM
Attorneys' fees were reserved. Not found awarded.
- (f) Byron-Jackson v. Ingersoll Rand
No. 4023-WM
Pre-trial two days. Trial appeared to be seven days. Held for defendant. Attorneys' fees \$3,000.00.
- (g) Helbrush & Monogram Mfg. Co. v. Finkle
No. 5453-O'C
Trial one day. Held for Defendant. Attorneys' fees \$500.00. Harris, Kiech, Foster & Harris, defendant's attorneys in the present case, filed a brief Amicus Curiae objecting to \$500.00 as attorney's fees. See entire brief in another affidavit filed contemporaneously herewith.
- (h) Gibbs v. Faulkner
No. 5566-Y
Trial appeared to be for three days. Held for plaintiff. Attorneys' fees \$500.00. [140]
- (i) Gate-Way, Inc. v. Hillgren
No. 6778-O'C
Pre-Trial one day. Trial one day. Held for defendant. Attorney for defendant asked \$3,300.00 fees. Awarded \$1,500.00. Motion

entered by plaintiff to amend Findings of Fact and Conclusions of Law. Still pending.

- (j) Reverse Stitch v. California Reverse Stitch
No. 7398-O'C
Pre-trial one day. Trial two or four days; argument in court as to trial time. Held for plaintiff. Attorneys' fees \$500.00.
- (k) Long v. Deats & Acme Appliance
No. 7701-PH
Trial appeared to be four days. Held for plaintiff. Attorneys' fees denied.
- (l) Maitlen & Benson v. Thermacote
No. 7820-PH
Jury trial appeared to be six days. Directed verdict for plaintiff. Each party bore own expenses.
- (m) Watt v. Mattson's of Hollywood
No. 8181-BH
Trial two days. Held for plaintiff. Attorneys' fees \$2,500.00.
- (n) Polizzi v. Firestone No. 5927-WM
Pre-trial one day. Trial one day. Attorneys' fees \$800.00.
- (o) Ward & Butler v. Dunham No. 6192-WM
Trial appeared to be three days. Held for defendant. Attorneys' fees \$500.00. [141]

- (P) Blanchard v. Pinkerton No. 7734-Y
Trial appeared to be three days. Held for
defendant. Attorneys' fees not awarded.
- (q) Moebs v. Estate of Jesse F. Brown
No. 7950-BH
Held for defendant. Attorneys' fees not
awarded.
- (r) National Lead Co. v. Standard Oil
No. 4112-B
National Lead Co. v. Shell No. 4113-B
These cases were consolidated. Trial ap-
peared to be twenty-eight days. Attorneys'
fees were mentioned but left blank in the
record. Also left blank in COB 49/102 and
COB 49/104 of each case respectively.
- (s) York Corp. v. Refrigeration Engineering
No. 4166-PH
Trial appeared to be eight days. Attorneys'
fees were mentioned but not awarded.

It will be noted that in four (4) of the above cases the attorneys' fees were \$500.00, eleven (11) of them granted no attorneys' fees, one of them granted \$800.00, one \$1,500.00, and one \$2,500.00, and the highest ever given by this Court, (apart from *Dubil et al. v. Camp, et al., supra*), were \$3,000.00.

That if the formula sometimes used that \$100.00 per day be awarded attorney's fees, counting the days of trial and an equal number of days of preparation, were applied, this would in the present

case make nine (9) days of trial, nine (9) days of preparation, and four (4) hours of preliminary hearings, or a total of less than nineteen (19) days. At \$100.00 per day, by this rule the attorneys' fees would be less than \$1,900.00. If eighteen (18) and a fraction days were charged for, the sum of \$20,000.00 would be more than \$1,000.00 per day for office work [142] and court work. That, it is submitted, would appear excessive and out of line with the attorneys' fees heretofore entered by this Court.

Another view of the case is that defendants in any event would only be entitled to attorneys' fees on the patent end of the case and are not entitled to attorneys' fees on the trade-mark infringement or the unfair competition part of the case. Attorneys' fees undeniably were never awarded for trade-mark and unfair competition cases prior to August, 1946. A statute in derogation of the common law should, in accordance with the well-known rule, be strictly construed. Therefore, the statute allowing attorneys' fees in a "patent case" should, it is submitted, be limited to patent matters and not extended to trade-mark and unfair competition matters.

Assuming that the trade-mark infringement and unfair competition phases of this case took one-half of the time, that would mean that the \$20,000.00 would be awarded for about four and one-half ($4\frac{1}{2}$) days, plus about four (4) hours for the court work on preliminary motions. An equal amount of preparation would make less than ten (10) days for

the trial and preparation of the patent side of this case, or over \$2,000.00 per day for such work.

/s/ DONALD C. RUSSELL.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal] /s/ VESTA NELSON,

Notary Public in and for said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed July 22, 1949. [143]

[Title of District Court and Cause.]

DONALD C. RUSSELL AFFIDAVIT RE
PRIOR PROCEEDINGS IN THIS CASE

State of California,
County of Los Angeles—ss.

Donald C. Russell, of the aforesaid County and State, being first duly sworn, on oath deposes and says that he is an attorney-at-law, practicing in Los Angeles, California; that he has made a careful search of the file in the above entitled case and finds the following facts from such file, or by being present on such occasions:

Affiant carefully examined the docket, record and file in the present case of *Dubil v. Camp*, supra, and as a result thereof states that no pre-trial was conducted in said case. That as a result thereof finds that only two plant inspections were made in said

case: one consisted of a half day at the plant of the [145] of the defendant Camp, on the afternoon of March 24, 1949. The other plant inspection was at the plant of the plaintiff Shores. That the plaintiff's counsel was at the said plaintiff's plant less than one hour at the time of such inspection, which was on March 25, 1949. That no accounting has been had in said case. That the following depositions were taken:

Name	Date Taken	Estimated Time (Hrs.)
1. Rayford Camp	January 18, 1949	1 $\frac{3}{4}$
2. Earl F. Shores	January 18, 1949	1 $\frac{1}{2}$
3. Edward J. Hubik	January 19, 1949	1
4. Rayford Camp	January 27, 1949	1 $\frac{1}{2}$
5. William J. Dubil	January 27, 1949	1
6. Rayford Camp	February 11, 1949	1 $\frac{1}{4}$
7. Earl F. Shores	February 25, 1949	1 $\frac{1}{6}$
8. Edward Munyon	February 25, 1949	1 $\frac{1}{2}$
9. William H. Sloan	March 2, 1949	1 $\frac{1}{2}$

(Taken on written interrogatories in Chicago. No counsel was present.)

That the trial of this case took nine days, to wit, March 28 to 31, and April 1 and 4 to 7, 1949. That the trial was conducted by the Honorable Charles C. Cavanah, District Judge from the State of Idaho. Judge Cavanah did not sit in said case and was not present at any of the proceedings therein prior to the first day of the trial thereof, to wit, March 28, 1949.

That on November 1, 1948, there was a hearing before the Honorable Leon R. Yankwich, District Judge of this Court, on the defendants' Motion brought by the defendant to dismiss the second count of plaintiffs' Complaint for lack of jurisdic-

tion of this Court. That said Motion was decided adversely to the defendants. The hearing took less than one (1) hour.

On February 28, 1949, there was a hearing before the said Judge Yankwich on plaintiffs' objections to defendants' 28 interrogatories. The plaintiffs' answered 7 interrogatories without objection and objected to 21 of them. Of those 21, the Court stated that the plaintiffs did not have to answer $15\frac{2}{3}$ of them, and ordered the plaintiffs to answer $5\frac{1}{3}$ of the 21 interrogatories objected to. The latter hearing took less than one (1) hour.

The only other hearings in said case were on March 17th and March 21st, 1949, respectively, on plaintiffs' Motion to inspect defendants' plant and plaintiffs' Motion to strike paragraph "M" from the Answer to the Amended Complaint and Counterclaim. The Court granted the plaintiffs' Motion to inspect defendants' plant and permitted the defendant to amend said paragraph at said hearing, and after it was amended, denied the Motion to strike said paragraph. Said hearings each took approximately one (1) hour or less.

/s/ DONALD C. RUSSELL.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal] /s/ VESTA NELSON,

Notary Public in and for said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed July 22, 1949. [147]

[Title of District Court and Cause.]

DONALD C. RUSSELL AFFIDAVIT RE
HARRIS, KIECH, FOSTER & HARRIS
BRIEF ON ATTORNEYS' FEES

State of California,
County of Los Angeles—ss.

Donald C. Russell, of the aforesaid County and State, being first duly sworn, on oath deposes and says that he is an attorney-at-law, practicing in Los Angeles, California; that the following is a brief that Harris, Kiech, Foster & Harris, Esqs., counsel for the defendants here, filed as Amicus Curiae in the case of Helbrush et al. v. Finkle, No. 11,761, in the United States Circuit Court of Appeals for the Ninth Circuit, about thirteen months ago, relating to attorneys' fees under the new statute (35 U.S.C.A. § 70). That brief was joined in by C. G. Stratton, counsel for plaintiffs in the instant case, and eleven other attorneys in Los Angeles, San Francisco, and Stockton, [129] California. That said brief reads in full as follows:

“Brief As Amicus Curiae

“It is an Abuse of the Trial Court’s Discretion to Award Attorneys’ Fees to a Prevailing Defendant Sued for Infringement of Letters Patent Unless There is Some Evidence of Special Circumstances Justifying Such Award. (All underlined matter printed in black-face in original brief.)

“In a patent infringement action attorneys’ fees may be awarded by the Trial Court in its discretion

pursuant to 35 U.S.C.A. 70, as amended in 1946, which provides in part:

“‘. . . The Court may in its discretion award reasonable attorney’s fees to the prevailing party upon the entry of judgment on any patent case.’

“The statute does not imply that attorneys’ fees should in every instance be awarded the prevailing party but requires the Trial Court to apply its best judgment to a determination of the proper circumstances under which an award should be made; and in doing so the Trial Court must act in conformity with established precedent and the intent and purpose of the statute conferring such discretion. Action by the Trial Court, according to its own will or pleasure without reference to determining principles, constitutes an abuse of discretion which the Appellate Court may set aside.

Bowles v. Quon, 154 F. (2d) 72, 73 (C. C. A. 9, 1946). [130]

“(a) It Was Not the Purpose of the Amended Statute, 35 U.S.C.A. 70, to Award Attorneys’ Fees to the Prevailing Defendant in a Patent Infringement Suit Except Under Special Circumstances Resulting in a Gross Injustice.

“The expressed purpose of Congress in passing the amendment to 35 U.S.C.A. 70, under which the Trial Court made the award, herein, is stated in Senate Report No. 1503, June 14, 1946, which was adopted by the Senate Committee on Patents from a report of the House Committee on Patents. The relevant portion reads as follows:

“ ‘By the second amendment the provision relating to attorney’s fees is made discretionary with the court. It is not contemplated that the recovery of attorney’s fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty.

“ ‘*The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.* (Italics are ours.)’

“An infringement suit brought merely to vex or harass the defendant without any substantial likelihood of recovery or reasonable grounds for belief in the validity of the patent or infringement thereof might well result in a gross injustice to an alleged infringer forced at great cost to defend such action. It is suits of this type the statute obviously seeks to thwart by providing the hazard of an additional penalty which may be imposed on those who litigate in bad faith; but for the Trial Court to apply [131] this same penalty to the ordinary patent suitor, who, in good faith and with reasonable chances for recovery, brings his action to protect his due right, is to condemn the innocent with the guilty and thereby negate the beneficial purpose of the amendment. An award of attorneys’ fees by the Trial Court in such an instance disregards the statutory intent and is an abuse of the Court’s discretion.

“(b) The Award of Attorneys’ Fees to the Prevailing Party in a Patent Infringement Suit in the Absence of Special Circumstances Is Contrary to Well Established Precedence.

“Prior to the enactment of the amendment to 35 U.S.C.A. 70 heretofore quoted, it was long established that an allowance of attorneys’ fees to the successful party in a patent infringement action was improper. The basis of this rule was explained at some length by the Supreme Court in *Oelrichs v. Williams*, 82 U.S. 211; 21 L. Ed. 43 (1872), as resting on sound public policy:

“ ‘ . . . It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Teese v. Huntington*, 23 How. 2 (64 U.S., XVI, 479); *Whittemore v. Cutter*, 1 Gall. 429; *Stimpson v. The Railroads*, 1 Wall., Jr., 164 . . . ’ (p. 45).

“ ‘ . . . In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust [132] the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are

necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

“ ‘*We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.*’ (p. 45) (Italics in last paragraph are ours.)

“The present amendment to 35 U.S.C.A. 70, being in derogation of a long established rule of law forbidding counsel fees, should be strictly construed as making only such change as is clearly indicated by the legislative expression and intent.

Shaw v. Merchants National Bank, 101 U.S. 575, 25 L. Ed. 892 (1880).

Further precedent for the interpretation of the new amendment is the judicial construction placed upon a substantially [133] similar statute relating to attorneys' fees in copyright cases. That statute (17 U.S.C.A. 40), after providing for the allowance of full costs, states:

“ ‘In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be al-

lowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. (Mar. 4, 1909, c.320, § 40, 35 Stat. (1084).'

"While the language of the two statutes is not identical, they are similar in effect and legal import. The Courts have consistently interpreted the provisions of the copyright statute as discretionary only and have generally refused to award attorneys' fees to the prevailing party except under special circumstances where dictated by equity and good conscience. This Court, for example, in construing the copyright section in *Buck v. Bilkie*. 63 F. (2) 447 (C.C.A. 9, 1933), said:

"Under section 40 of the act (17 U.S.C.A., § 40), "the Court may award to the prevailing party a reasonable attorneys' fee." Any such award is clearly discretionary: We find no abuse of discretion in the denial of attorneys' fees, inasmuch as infringement ceased immediately on what defendant testified to have been the first notice received.' (p. 447).

"Although the amendment to 35 U.S.C.A. 70 is too recent to have received extensive judicial interpretation, in a number of well reasoned District Court opinions counsel fees have been denied in the exercise of the Court's discretion under this section. [134] "In *Juniper Mills, Incorporated v. J. W. Landenberger & Co.*, 76 U.S. P.Q. 300 (Advance Sheet) (D. C. E. D. Pa., 1948), Judge Kirkpatrick, on plaintiff's motion for an award of attorneys' fees, stated:

“ ‘It has never been supported that counsel fees are normally allowable to a successful party as part of the costs. In most, if not all, cases, where statutory authority has been given to the court to allow them, the intention has been to make the allowance something in the nature of a penalty for some sort of unfair, oppressive or fraudulent conduct on the part of the losing party. I think this was the reason why the 1946 amendment made the award discretionary with the court and I believe the court should not award an attorney’s fee as costs in an ordinary normal patent case.’ (p. 300)

“ ‘Similarly, in the case of *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D. Ohio, 1947) (75 U.S.P.Q. 267), the Court held that in an ordinary patent action an award to the prevailing defendant was not authorized by the statute:

“ ‘. . . It is apparent from the wording of the statute and its history that an award of attorneys’ fees should not be made in an ordinary case. The court is invested with discretionary power where it is necessary to prevent gross injustice. The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances of gross injustice . . . This Court does not consider that the action by the plaintiff was absolutely [135] unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the

conditions indicated in the statute must be made to entitled the appliant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorneys' fees to the prevailing party . . .' (p. 294)

"The Lincoln Electric case is quoted with approval by Judge Starr in *National Brass Company v. Michigan Hardware Company*, 76 U.S.P.Q. 186 (Advance Sheet) (D.C., W.D. Mich., 1948). After reviewing extensively the judicial interpretation of the provision permitting attorneys' fees in copyright cases and reasoning from such construction to interpret the new patent provision, the Court concluded:

'A careful review of the pleadings, testimony, and circumstances in the present case clearly indicates that it was the usual and ordinary suit for infringement of patent and that it was instituted in good faith and vigorously prosecuted. The court finds no evidence indicating bad faith or dilatory, harassing or vexatious tactics on the part of the plaintiff. There appear to be no special circumstances and no equitable considerations which would justify an award of attorneys' fees to the defendant . . .' (p. 187)

"It is apparent that a Trial Court in awarding attorneys' fees in the absence of special circumstances, fails to construe the new amendment in accordance with its express purpose and intent and fails to look to the history of the amendment, the judicial interpretation of analogous statutes, [136]

and the decisions of other Courts in determining principles and proper guidance.

“It is submitted that it will be of great assistance to the District Courts of this Circuit, the patent bar, and patent litigants if this Court will clearly state the rule to be that in awarding reasonable attorneys’ fees to the prevailing party in accordance with the provision of 35 U.S.C.A. 70, as amended in 1946, the Court should award such fees only in a case involving bad faith or dilatory, harassing, or vexatious tactics on the part of the losing party or similar special circumstances establishing inequitable conduct by such party.

“Dated: At Los Angeles, California, this 19th day of May, 1948.

“Respectfully submitted,

“HARRIS, KIECH, FOSTER &
HARRIS, WARD D. FOSTER,
WARREN L. KEARN,

By WARD D. FOSTER,
Amicus Curiae.”

/s/ DONALD C. RUSSELL.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal] /s/ VESTA NELSON,

Notary Public in and for said County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed July 22, 1949. [137]

[Title of District Court and Cause.]

MEMORANDUM OF DEFENDANTS WITH RESPECT TO PLAINTIFF'S AFFIDAVITS, PETITION, AND OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiffs have submitted to this Court a petition, affidavits, and detailed objections to the proposed Findings of Fact and Conclusions of Law heretofore filed by Defendant Rayford Camp in accordance with the Court's request. The main purpose of these documents, it is clear, is to alter the decision of the Court as set forth in the opinion rendered herein on May 23, 1949, particularly with respect to the award to Defendants of attorneys' fees in the sum of Twenty Thousand Dollars (\$20,000.00).

Defendant Rayford Camp, in drafting the proposed findings to which objection is made, has sought to abide by and incorporate the decision actually reached by the Court after a very complete and thorough trial lasting for nine days and followed by lengthy oral arguments. Plaintiffs, on the other hand, are still arguing the case.

By these objections, which are mere arbitrary statements, for the most part, unsupported by references to the record, the Plaintiffs apparently hope to eliminate a sufficient number of findings to weaken the Court's judgment for appeal purposes

and leave but a shred of the evidence or factual structure on which it may be sustained.

In addition, Plaintiffs submit a petition and various affidavits of an employee of counsel, Donald C. Russell, not to correct an alleged error in the proposed findings to bring them in line with the opinion, but to persuade the Court that it decided improperly the amount of attorneys' fees.

Clearly, it is not the purpose of objections to proposed findings to reargue the case, just decided, or petition for a change of decision. Counsel, if he believes the decision is in error as to any point, may, after entry of judgment, move to amend the findings in accordance with Rule 52(b) of the Federal Rules of Civil Procedure or subsequently bring an appeal.

As stated by Judge Yankwich in a recent unfair competition case, *Brooks Bros. v. Brooks Clothing of California, Ltd.*, 5 F.R.D 14 (D.C. S.D.Cal. 1945), in which both sides tried unsuccessfully by objections to findings to persuade the Court more favorably after a lengthy trial and full opinion had been rendered:

“This case has had the fate of all strongly contested cases in which the judgment of the Court, because it does not grant either side all they ask, satisfies neither. This has brought on the very situation which I have sought to avoid—namely, that of having each side attempt, even before the Findings were signed, to change the decision arrived at on May 5, 1945. . . .

* * * *

“This is contrary to our practice. For it is assumed that when counsel for the prevailing party, on order of court, prepares findings which are unfavorable to him, he does not waive the right to question them on appeal from the judgment which carries them into effect, if the portion of the judgment based on these findings is separable from the portion favorable to him.

“The defendant, in turn, has filed objections, which reach practically every finding, except those which contain narrative facts not in dispute. If allowed, there would be little, if anything, left to sustain the judgment.” (p. 15)

Defendant's Findings of Fact are fully supported by the evidence, but we hesitate to re-brief and re-argue the case (as Plaintiffs have done in their “objections”) without leave of the Court. If the Court is in doubt as to the propriety of any of our findings, we respectfully ask leave to support them by a further memorandum. Similarly, on the question of attorneys' fees and costs, we stand ready to establish the many hundreds of hours of work put in by Defendant's counsel in defense of this unwarranted action, and shall be pleased to have an opportunity to do so.

It is respectfully requested, therefore, that the Court make findings of fact and conclusions of law, and enter judgment, as submitted by Defendant

Rayford Camp in accordance with the opinion previously rendered herein.

Dated: At Los Angeles, California, this 26th day of July, 1949.

HARRIS, KIECH, FOSTER &
HARRIS,
FORD HARRIS, JR.,
WARREN L. KERN,
By /s/ FORD HARRIS, JR.,
Attorneys for Defendants.

BODKIN, BRESLIN & LUDDY,
GEORGE M. BRESLIN.
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Rules of Civil Procedure and Rule 7 of the Local Rules of the District Court of the United States for the Southern District of California, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

I.

The plaintiffs William J. Dubil and Edward J.

Hubik are citizens and residents of the State of California, and plaintiff Earl F. Shores is a citizen and resident of the State of California, doing business in the County of Los Angeles, State of California, under the fictitious name of Chip Steak Company of Los Angeles, California. [138]

II.

The defendant Rayford Camp is a citizen and resident of the State of California, doing business in the County of Los Angeles, State of California, under the fictitious name of Rayford Camp & Co. Defendant Camp is the only defendant in this action.

III.

The patent in suit, United States Letters Patent No. 2,052,221, on Method of Preparing Fresh Meat, was issued on August 25, 1936, to the plaintiffs William J. Dubil and Edward J. Hubik upon application Serial No. 40,416, filed in the United States Patent Office on September 13, 1935 by plaintiff William J. Dubil. No evidence was offered by plaintiffs as to the date of the alleged invention of the subject matter of patent No. 2,052,221, in suit. Consequently, such alleged invention is considered as made on September 13, 1935, the date upon which the application for the patent in suit was filed in the Patent Office. At all times, since prior to the issuance of patent No. 2,052,221, in suit, plaintiffs Dubil and Hubik have each owned an undivided one-half interest therein.

IV.

The plaintiffs William J. Dubil and Edward J. Hubik, by license agreement dated August 26, 1948, purported to grant to plaintiff Earl F. Shores the exclusive right to practice the method of said United States Letters Patent No. 2,052,221 throughout the County of Los Angeles, State of California, except the cities of Long Beach and Pomona, and except that territory which is bounded on the north by Slauson Avenue, on the south by Century Boulevard, on the west by Santa Fe Avenue, and on the east by Atlantic Boulevard, all in the City of Los Angeles. [139]

V.

The defendant has employed two methods or processes of preparing fresh meat, one of which has been referred to in this case as defendant's "No. 1 Process", and the other of which has been referred to herein as defendant's "No. 2 Process". Defendant's No. 1 Process generally consists in freezing fresh meat to a slicing temperature, e.g., below 28° F., and then slicing it while at such temperature. Defendant's No. 2 Process generally consists in subjecting fresh meat to a relatively low temperature (e.g., around 0° F.) for a period of time (e.g., fifteen to nineteen hours), then subjecting the meat to a higher temperature (e.g., 28° F. or below) for a second period of time, and then slicing the meeat.

VI.

Defendant's No. 1 Process is generally described

in patent No. 2,052,221 in suit, but is not claimed therein, and plaintiffs admit that it does not infringe any claim of the patent in suit. Plaintiffs admit that neither claim 3 nor claim 5 of the patent in suit is infringed by any process or method practiced by the defendant. Plaintiffs contend, however, that claims 1, 2, 4, and 6 of patent No. 2,052,221, in suit, are infringed by the No. 2 Process practiced by the defendant.

VII.

The patent in suit, No. 2,052,221, describes and claims a method of preparing fresh meat. Said patent describes, and each of the claims 1, 2, 4, and 6 of the patent claims, a process consisting of a series of steps which, as illustrated in typical claim 1, in sequential order, are: first, freezing fresh meat solid throughout; second, thawing the meat to approximately 30° to 32° F. throughout; and third, slicing the meat into thin slices. [140]

VIII.

Each of the steps of the process described and claimed in the patent in suit, and the combination of such process steps, as set forth in each of the claims in suit, is old in the art of preparing fresh meat and had been previously taught by the disclosures of: United States Letters Patent No. 1,864,284, to Taylor, issued June 21, 1932, in evidence as Exhibit F-2; United States Letters Patent No. 1,864,285, to Taylor, issued June 21, 1932, in evidence as Exhibit F-3; United States Letters Patent

No. 2,137,897, to McKee, issued November 22, 1938, on application Serial No. 486,737, filed October 6, 1930, in evidence as Exhibit F-4. Claims 1, 2, 4, and 6 of the patent in suit, No. 2,052,221, and each of them, are void and invalid for lack of novelty in view of said disclosures of said prior-art patents.

IX.

In granting the patent in suit, No. 2,052,221, the United States Patent Office overlooked and did not consider the most pertinent prior-art patents, namely, Taylor, No. 1,864,284, McKee, No. 2,137,897, and McKee, No. 2,140,162, the latter two patents being pending in the Patent Office on applications filed prior to the application for the patent in suit at the time of the grant thereof. The specifications of the applications for said McKee patents No. 2,137,897 and No. 2,140,162, as originally filed in the Patent Office, were substantially identical in all material respects to the specifications appearing in said patents as issued, in evidence as Exhibits F-4 and F-5, respectively. Consequently, said McKee patents No. 2,137,897 and No. 2,140,162 are both prior art as to the invention in suit. Any presumption of validity arising from the grant of the patent in suit, No. 2,052,221, is fully rebutted by the evidence. [141]

X.

Although the patent in suit discloses and claims a slicing temperature range of 30° to 32° F. in the performance of the process of the patent in suit, such temperature range is within the slicing tem-

perature range of 0° to 32° F. broadly disclosed in the McKee patent No. 2,137,897, defendant's Exhibit F-4, and the mere selection of such narrower slicing temperature limits by the patentee of the patent in suit did not involve any invention.

XI.

An attempt was made by plaintiffs at the trial to prove invention by a showing of the commercial success of laminated steaks of the type produced by the claimed process. However, the plaintiff Shores and the plaintiff's witness Urton, both of whom testified to substantial production and sales of laminated steaks, did not actually produce such steaks according to the process claimed in the patent in suit, but admitted that they employed a slicing temperature without the 30° to 32° F. range specified in the claims of the patent in suit, and none of the evidence introduced by plaintiffs proved that any commercial success of the laminated steaks was actually attributable to the specific process claimed in the patent in suit.

XII.

The process defined by claims 1, 2, 4 and 6 of patent No. 2,052,221, in suit, was known and used in the United States by defendant Camp and others more than two years prior to the filing date of the application for the patent in suit and long prior to any alleged date of invention of the subject matter of the patent in suit by the patentee thereof. In the year 1933, defendant Camp and the witness

Rumley were employed as butchers in the meat concession at the Jess Willard Market in Hollywood, California, such meat concession being owned by the witnesses [142] William Fredrick and Laurence Fredrick. Commencing in the year 1933, defendant Camp, the witnesses, Rumley and Laurence Fredrick, and others commercially practiced the process disclosed in the patent in suit and set forth in claims 1, 2, 4, and 6 thereof at said Jess Willard Market, in the making of frozen laminated steak products, and such products were substantially continuously sold commercially by said Fredricks in said Jess Willard Market and in other markets in meat concessions located in Los Angeles, California, and owned by said Fredricks until at least the year 1938. In the year 1934, said Fredricks adopted the name "Strato-Steak" for said products and thereafter used the same thereon in connection with the sale of said products, William Fredrick making application for California State Trade-Mark registration on such name on September 11, 1935, as exemplified by Exhibit P in evidence. One such laminated steak product so made and sold by said Fredricks was composed of five to seven slices of fresh meat, sliced to approximately the thickness of chipped beef, substantially circular in form, and having a diameter of four to seven inches. Such laminated steak products were made by first freezing solid a substantially cylindrical piece of fresh meat, then thawing said meat to a temperature at which it was only partially frozen, and then slicing

the same into very thin slices, and assembling the slices into individual frozen steaks. The fact of such prior knowledge and use by defendant Camp and the witnesses Rumley, William Fredrick, and Laurence Fredrick, is established beyond a reasonable doubt, and adequate notice of such prior knowledge and use was given to plaintiffs prior to the trial of this action.

XIII.

Although the patent in suit, No. 2,052,221, discloses and specifically claims a slicing temperature range of approximately 30° to 32° F., the evidence established that the claimed process could not be successfully performed within that entire 30° to 32° F. temperature range. Claims 1, 2, 4, and 6 of patent No. 2,052,221, [143] in suit, therefore overclaim the alleged invention, are fatally indefinite, and are invalid.

XIV.

In connection with the prosecution before the United States Patent Office of the application for patent No. 2,052,221, in suit, the plaintiff Hubik by sworn affidavit, and plaintiff Dubil's attorney, as shown by the file-wrapper Exhibit E in evidence, represented in effect that fresh meat at a temperature of 26° F. to 28° F. could not be sliced to the thickness of ordinary chipped beef, and in reliance upon said representations the Patent Office granted the patent in suit. It was established at the trial that fresh meat at a temperature of 26° to 28° F.

can readily be sliced to such thickness. This was demonstrated in open court by a court room demonstration by defendant and by admissions by the plaintiff Hubik. Furthermore, the plaintiff Hubik admitted that he signed such affidavit with the intent that it be forwarded to the Patent Office in connection with the application for the patent in suit, and that at that time he knew that such fresh meat could be sliced to the thickness of chipped beef when the temperature of the meat was at 28° F. and below. Such representations made by plaintiffs Hubik and Dubil to the Patent Office were, therefore, knowingly false, and the patent was irregularly granted and is invalid as a result thereof. In view of such misrepresentations to the Patent Office, and his demeanor and manner while testifying, the testimony of the plaintiff Hubik in favor of the plaintiffs is entitled to no credibility in this action.

XV.

Although in a previous decree of this Court in the case of Dubil v. Landau, et al, Case 247-B, the patent in suit was held valid, such prior decree against Landau was by consent of the parties. As indicated by defendant's Exhibits S, T, and U, introduced into [144] evidence, being the Findings of Fact and Conclusions of Law, the report of the Special Master and the Final Decree in that earlier case, the prior art pleaded in the present case was not then before the Court, nor were the other defenses on which findings have hereinabove been made.

XVI.

The plaintiff Hubik adopted and used the name "Chip Steak" in or about the year 1936 for thinly sliced or laminated steaks produced and sold by said plaintiff, and on September 14, 1936 registered said name as a trade-mark in the office of the Secretary of State of the State of California, Registration No. 20,515.

XVII.

Since 1938, plaintiff Shores has sold thinly sliced fresh meat molded in a round shape with six of such slices laid one upon another to form a steak, with labels consisting of waxed paper sheets with the name "Chip Steaks" appearing thereon in a curve or arch adjacent a picture of a beef animal, said sheets bearing such mark being placed between the laminated steaks sold by plaintiff Shores.

XVIII.

Since March, 1948, the defendant Camp has used the trade-mark "Camp Steak" for thinly sliced or laminated steaks moulded in a round shape with six of such slices laid one upon another, the words "Camp Steak" being arranged in a curve or arch adjacent the picture of a head of a beef animal, and defendant Camp imprinted said mark on waxed paper sheets placed between the laminated steaks produced and sold by said defendant. [145]

XIX.

The evidence establishes that the name "Chip Steaks" is descriptive of the nature of the product.

Such name, the evidence establishes, is the generic term by which laminated or thinly sliced steaks of various manufacture are known to the trade and public alike, and have been so known since long prior to any asserted adoption or use of such name by any of the plaintiffs. The name stands for a product and not for any one of the many numerous makers thereof, and is incapable of exclusive appropriation through acquisition of a secondary meaning pertaining to plaintiffs or their licensees.

XX.

The defendant's label bearing the trade-mark "Camp Steak", Exhibit 3 in evidence, is so dissimilar to plaintiffs' label bearing the name "Chip Steaks", Exhibit 2 in evidence, in color scheme, legend and format, that no reasonable buyer would be misled by such labels into believing that defendant's goods were those of plaintiffs. The evidence establishes that there has been no confusion in the trade, or among members of the public, as to the source of the products of plaintiffs and defendant, respectively, and no one has been misled in any way by defendant's label, Exhibit 3 in evidence. Defendant Camp is entitled to continue to use his label, Exhibit 3 in evidence, upon laminated steak products without let or hindrance from the plaintiffs or their agents, licensees, or assignees.

XXI.

Defendant Rayford Camp is not guilty of any infringement of any trade-mark of plaintiffs, or any of them. [146]

XXII.

It is not a fact that the laminated steaks of plaintiff Shores bearing the name "Chip Steaks", on waxed paper sheets placed between the steaks, are produced in accordance with patent No. 2,052,221 in suit.

XXIII.

It is not a fact that by reason of any competent or efficient manner in which the plaintiff Shores has conducted his business or by reason of any extensive advertising of laminated steaks sold under the name "Chip Steaks" or by reason of any good will built up, the laminated steaks so labeled and sold to the public by plaintiff Shores have come to be associated with the plaintiff Shores in the mind of the trade or public.

XXIV.

The laminated steak products of the plaintiffs have certain physical features. They: are substantially circular; have a rosy red color; they approximately five inches in diameter; are made in steaks each having six thin layers; are packaged in cellophane; are sold with wax paper interposed between adjacent steaks; are each provided with a waxed label which is partially folded over the steak; are sold to the meat trade in white butcher paper; have layers which are about one thirty-second of an inch thick, or the thickness of chipped beef. All of said features were old and known in the meat art prior to any use thereof by plaintiffs and neither

separately nor collectively are the subject of any exclusive appropriation thereof by any of the plaintiffs. There is no evidence in this action that the use of any of such features by plaintiffs has come to identify the plaintiffs' goods with the plaintiffs, or any of them, in the mind of the trade or public. The evidence fails to establish that the use by defendant of any such features has misled or confused the trade or public as to the origin of defendant's goods. [147]

XXV.

Comparing the packages of laminated steaks of plaintiff Shores, plaintiffs' Exhibits 17, 18, and 21, and defendant Camp, plaintiffs' Exhibits 19, 20, and 22, introduced into evidence with their labels and wrappings, plaintiffs' Exhibits 2 and 3, it is clear that they are so essentially different that no one of ordinary intelligence desiring to buy plaintiff Shores's "Chip Steaks" would be misled into buying defendant's "Camp Steaks", and there is no evidence that anyone has been so misled or otherwise confused thereby as to the origin of the goods of the parties.

XXVI.

It is not a fact that the defendant Camp, since February or March, 1948, has been or is using in the territory of plaintiff Shores or elsewhere, in connection with the sale by said defendant of laminated steaks, labels simulating the labels of plaintiff Shores.

XXVII.

It is not a fact that the thinly sliced meat of the plaintiffs and of defendant Camp are practically undistinguishable by the ordinary customer at the time the same are offered to the public.

XXVIII.

It is not a fact that the use of the defendant's labels in connection with the sale of defendant's laminated steaks is calculated to or will deceive the trade or public into believing that they are buying the laminated steaks of the plaintiff Shores when they are, in fact, buying the defendant's said laminated steaks.

XXIX.

It is not a fact that the acts of the defendant complained of have caused irreparable injury to plaintiffs or any of them. The evidence fails to establish any injury or damage to plaintiffs, [148] or any of them, resulting from the acts of the defendant complained of.

XXX.

Prior to April, 1941, defendant Camp as an independent contractor sold "Chip Steaks" manufactured by plaintiff Shores. It is not a fact that the route upon which defendant sold "Chip Steaks" was owned or controlled by the plaintiff Shores, or that the list of customers serviced in said route was or is a confidential list or the property of the plaintiff. Defendant ceased the sale of such "Chip Steaks" manufactured by plaintiff Shores in April,

1941, and never sold them again. Defendant Camp did not formulate his plan and intent to manufacture or sell his present product "Camp Steaks", complained of, until the year 1947, more than six years after he ceased to sell the said "Chip Steaks" of plaintiff Shores.

XXXI.

It is not a fact that in February or March, 1948, or at any other time, the defendant Rayford Camp violated any rights of the plaintiff Shores in and to any list of customers, or after terminating any connection with plaintiff Shores wrongfully solicited any customers whom the defendant Camp had gotten to know by selling them "Chip Steaks".

XXXII.

Defendant's attorneys have been required to attend in Court on numerous separately contested motions in connection with this action prior to the trial thereof as well as at several pretrial hearings. Numerous depositions and plant inspections have been conducted, requiring the participation of such attorneys in addition to the nine days of trial time. The plaintiffs did not have justifiable cause for filing or prosecuting this action, [149] and trial of this action was unreasonably prolonged by plaintiffs. For all of which, defendant Rayford Camp is entitled to recover the sum of \$20,000.00¹ as attorneys' fees and costs against the plaintiffs, which I find to be a reasonable sum.

1. [In pencil above figures] —\$12,000

Conclusions of Law

I.

The Court has jurisdiction of the parties and the subject matter.

II.

The presumption of validity accompanying the grant of United States Letters Patent No. 2,052,221, in suit, is rebutted and destroyed by the failure of the United States Patent Office to cite and consider the most pertinent prior art in granting said Letters Patent.

III.

Each of the claims 1, 2, 4, and 6 of United States Letters Patent No. 2,052,221, in suit, is invalid and void for lack of novelty over the prior art.

IV.

Each of the claims 1, 2, 4 and 6 of United States Letters Patent No. 2,052,221, in suit, is invalid and void for lack of invention.

V.

Each of the claims 1, 2, 4 and 6 of United States Letters Patent No. 2,052,221, in suit, is invalid and void for the reason that the alleged invention thereof was known and used [150] by others in this country before the patentee's alleged invention or discovery thereof, and was in public use in this country for more than two years prior to the application therefor.

VI.

Each of the claims 1, 2, 4 and 6 of United States Letters Patent No. 2,052,221, in suit, is invalid and void for indefiniteness in failing to comply with Section 33 of Title 35, United States Code.

VII.

United States Letters Patent No. 2,052,221, in suit, and each of the claims thereof, is invalid and void for the reason that said patent was granted by the United States Patent Office upon material misrepresentations made to said Office to induce the issuance thereof.

VIII.

The name "Chip Steak", or "Chip Steaks", is a generic term which is descriptive in nature, and plaintiffs have not acquired any exclusive right to the use thereof.

IX

The name "Chip Steak" was improperly registered as a trade-mark in the State of California under Section 14,242 of the Business and Professions Code of the State of California and said registration thereof is invalid and void and should be cancelled pursuant to Section 14,246 of said Code.

X.

Defendant Rayford Camp has not infringed any trade-mark of the plaintiffs, or any of them. [151]

XI.

Defendant Rayford Camp has not engaged in any

unfair trade practices or unfair competition with plaintiffs, or any of them.

XII.

Defendant Rayford Camp has not violated any confidential relationship with plaintiff Earl F. Shores nor appropriated to himself any trade secrets or secret and confidential customer lists belonging to said plaintiff.

XIII.

Defendant Rayford Camp is entitled to judgment against the plaintiffs and each of them, dismissing the amended complaint herein and each of the counts therein stated.

XIV.

Defendant Rayford Camp is entitled to recover reasonable costs and attorneys' fees against the plaintiffs or any of them, such costs and attorneys' fees to be in the amount of fifteen thousand dollars (\$15,000.00).

XV.

Plaintiffs are entitled to judgment against the defendant Rayford Camp, dismissing the counter-claims set forth in his amended answer.

Judgment will be entered accordingly.

Dated:, this 2nd day of August, 1949.

/s/ CHARLES C. CAVANAH,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 4, 1949. [152]

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 8649-Y

WILLIAM J. DUBIL, EDWARD J. HUBIK, and
EARL F. SHORES,

Plaintiffs,

vs.

RAYFORD CAMP & CO., RAYFORD CAMP,
JOHN DOE, JANE DOE, and JOHN DOE
CO.,

Defendants.

JUDGMENT

This cause came on to be heard on November 1, 1948, February 28, 1949, March 21, 1949, March 28, 29, 30, 31, 1949 and on April 1, 4, 5, 6, and 7, 1949, and was tried in open Court, and upon consideration thereof and for good cause shown, it is hereby ordered, adjudged, and decreed as follows:

I.

That United States Letters Patent No. 2,052,221, granted August 25, 1936, to William J. Dubil, for Method of Preparing Fresh Meat, is invalid and void at law as to all of the claims thereof.

II.

That Trade-Mark Registration No. 20515, issued by the State of California to Edward J. Hubik on September 14, 1936, is invalid and void and should

be canceled pursuant to Section 14246 of the Business and Professions Code of the State of California.

III.

That defendant Rayford Camp has not infringed any trade-mark of the plaintiffs, or any of them.

IV.

That defendant Rayford Camp has not engaged in any unfair trade practices or unfair competition with plaintiffs, or any of them.

V.

That the Bill of Complaint and the Amended Complaint are hereby dismissed with prejudice.

VI.

That the Counterclaims of defendant are hereby dismissed with prejudice.

VII.

That defendant Rayford Camp shall recover from the plaintiffs, jointly and severally, attorney's fees in the sum of \$15,000.00, and costs.

Dated: This 2nd day of August, 1949.

/s/ CHARLES C. CAVANAH,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered Aug. 4, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF C. G. STRATTON

State of California,
County of Los Angeles—ss.

C. G. Stratton, of the aforesaid County and State, being first duly sworn, on oath deposes and says:

That he is attorney for the plaintiffs in the case of Dubil, et al., v. Rayford Camp & Co., et al., No. 8649-Y, in the United States District Court, Southern District of California, Central Division.

That at the time the defendants' counsel served on the undersigned the Findings of Fact and Conclusions of Law filed in said case, no pencil marks appeared between lines 2 and 3 on p. 13 thereof, and more particularly the pencilled notation of "12,000.00" above the typewritten "\$20,000.00," was not in said Findings at the time of said service. That upon the return of said Findings by the Trial Judge in said case, the pencilled notation "\$12,000.00" appeared above the typewritten figures "\$20,000.00." That subsequent to the time of service of said Findings upon the plaintiffs, no one has had the legal right to enter said note of "\$12,000.00" in the Findings except the said Trial Judge.

That on p. 15 of said Conclusions of Law, in the third line of paragraph XIV, above "fifteen" there appears the word "twelve" which has been mostly erased, but the "twelve" can still be seen upon close examination. That between lines 3 and 4 of paragraph XIV, the figures "\$12,000.00," although

mostly erased, still appear above the typewritten "\$15,000.00" upon close examination.

/s/ C. G. STRATTON.

Subscribed and sworn to before me this 11th day of August, 1949.

[Seal] /s/ VESTA NELSON,
Notary Public in and for the County of Los Angeles,
State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

PETITION TO STAY EXECUTION
ON JUDGMENT

Come now the above named plaintiffs and respectfully petition this Honorable Court for an Order staying the execution on the Judgment in the above case until the hearing set for Thursday, August 18, 1949, at 10:00 a.m., and as grounds therefor the plaintiffs show the following:

1. That the plaintiffs intend immediately upon the fixing of the supersedeas bond herein, to file a Notice of Appeal from the Judgment in this case, accompanied by the bond fixed by this Honorable Court.

2. That the filing of the Notice of Appeal has been delayed pending the fixing of the amount of the supersedas bond for the appeal in this case.

3. That the plaintiffs have been diligent in preparing for the appeal in this case. That this petition is not interposed for the purpose of delaying the appeal, and is made in good faith.

Dated this 16th day of August, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

So Ordered, this 16th day of August, 1949.

/s/ LEON R. YANKWICH,
U.S. District Judge.

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

NOTICE OF HEARING OF PETITION TO FIX
AMOUNT OF SUPERSEDEAS BOND

To the above named defendants, and Harris, Kiech,
Foster & Harris, Esqs., and Bodkin, Breslin &
Luddy, Esqs.,

Greetings:

Please take notice that on Monday, August 22, 1949, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the plaintiff will present to this Honorable Court the annexed Petition to Fix Amount of Supersedeas Bond herein.

Dated at Los Angeles, California, this 11th day of August, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

[Title of District Court and Cause.]

PETITION TO FIX AMOUNT
OF SUPERSEDEAS BOND

Come now the plaintiffs above named and under Rule 73(d) of the Rules of Civil Procedure, request this Honorable Court to fix a nominal amount for the supersedeas bond for the appeal in this case, or to order that the judgment of \$15,000.00 for attorneys' fees in this case be stayed pending appeal without the necessity of the plaintiffs posting any bond, and as grounds therefor show the following:

1. That the plaintiffs intend immediately upon the fixing of the supersedeas bond herein, to file a Notice of Appeal from the judgment in this case, accompanied by the bond fixed by this Honorable Court.

2. That on such appeal the plaintiffs are going to raise the points, among others, that the entry of a judgment for \$15,000.00 attorneys' fees in this case is excessive, is an abuse by the Court of its discretion, and is out of line with all precedents of this Court. There is no evidence in this case of defendants' attorneys' work other than nine (9) days in court for the trial of this case. There is no evidence in this case of any other work done by defendants' attorneys. There is no evidence as to what amount the defendants have paid their attorneys in this case, how much the defendants owe such attorneys, or how much was charged the defendants for this case.

3. That it would be a severe hardship on the plaintiffs to have to put up a \$15,000.00 bond. It is submitted that the defendants' attorneys are not entitled to an execution for attorneys' fees (as distinguished from a judgment for any other relief) until their services have been completed on appeal. Therefore, execution of attorneys' fees should be superseded pending the outcome of the appeal. Moreover, costs should be taxed in the usual manner and not entered arbitrarily by the Court without any foundation whatever.

4. This Honorable Court is respectfully requested to shorten the period prior to the hearing in this matter, due to the relatively short time required to file a Notice of Appeal, which period is now running.

At the hearing on this matter, the plaintiffs will rely upon the foregoing grounds, the record made in this case, including but not exclusively the affidavits of the said Donald C. Russell on file herein, and on the annexed affidavit of the undersigned.

Dated at Los Angeles, California, this 15th day of August, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

ORDER RE SUPERSEDEAS BOND

This cause coming on to be heard this 18th day of August, 1949, the Court having considered the plaintiffs' Petition to Fix Amount of Supersedeas Bond, and having heard arguments by counsel for the plaintiffs and defendants and being fully advised in the premises,

Hereby Orders, Adjudges and Decrees that execution upon the judgment in the above entitled action be stayed down to and including Thursday, the 25th day of August, 1949; that after notice and hearing and good cause having been shown, this Court fixes the amount of the supersedeas bond for appeal in this case at One Thousand Dollars (\$1,000); that upon filing a Notice of Appeal and upon the posting of One Thousand Dollars (\$1,000) cash with the Clerk of this Court as a cash supersedeas bond for said appeal, on or before the 25th day of August, 1949, and upon filing of the statements hereinafter referred to, on or before said date, the judgment herein shall be stayed during the pendency of said appeal. That a surety bond in the sum of One Thousand Dollars (\$1,000), approved by this Court, may be substituted for said cash bond. That said statements shall be signed by the plaintiffs herein respectively and shall agree that during the pendency of the appeal in this case the plaintiffs severally will not, without the approval of this Court, nor

without notice to counsel for the defendants in the above case, dispose of the businesses of the said plaintiffs respectively, encumber them, or file voluntary petitions in bankruptcy respectively.

Dated this 22nd day of August, 1949.

/s/ LEON R. YANKWICH,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that William J. Dubil, Edward J. Hubik, and Earl F. Shores, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 4th day of August, 1949.

Dated at Los Angeles, California, this 18th day of August, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Come now the plaintiffs above-named, and designate that the complete record, all the proceedings and evidence of the above-entitled case shall be contained in the record on appeal.

Dated at Los Angeles, California, this 26th day of August, 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed August 27, 1949.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO FILE
RECORD ON APPEAL AND TO DOCKET
THE APPEAL

It Is Hereby Stipulated by and between the above named parties, by their respective counsel, that the plaintiffs may have down to and including Tuesday, November 22, 1949, within which to file the record on appeal in the above case, and to docket the appeal in the Court of Appeals, for the Ninth Circuit. This Stipulation is based upon the fact that other matters extraneous to this case may effect this appeal prior to said date.

Dated at Los Angeles, California, this 27th day of Sept., 1949.

/s/ C. G. STRATTON,
Attorney for Plaintiffs.

HARRIS, KIECH, FOSTER &
HARRIS,
BODKIN, BRESLIN & LUDDY,

By /s/ [Illegible]

Attorneys for Rayford Camp & Co., and Rayford
Camp.

The foregoing stipulated extension is hereby granted, this 3rd day of October, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed October 3, 1949.

WILLIAM J. DUBIL, EDWARD J. HUBIK, and
EARL F. SHORES,

vs.

RAYFORD CAMP & CO., RAYFORD CAMP,
JOHN DOE, JANE DOE, and JOHN DOE
CO.

ATTORNEYS

For Plaintiff:

C. G. STRATTON.

For Defendant:

WARREN L. KERN.

COMPLAINT FOR INFRINGEMENT OF UNITED STATES LETTERS PATENT No. 2,052,221

Date	Plaintiff's Account	Received	Disbursed
9/16/48	C. G. Stratton	16.00	
10/13/48	Treas		15.00
1/14/49	Treas50
8/25/49	C. G. Stratton-Appl.	5.00	
10/14/49	Treas		5.50

DOCKET ENTRIES

1948

Sept. 16—Fld Compl Infringmt Letters patent. Issd
Sums. Md report JS-5.

Sept. 30—Fld Sums—retn svd.

Oct. 5—Md openg rept to Comr Patents.

Oct. 11—Fld stip & ord thereon dfts hv to & inc
10/30/48 to plead or move.

1948

Oct. 21—Fld dft's not of mo retble 11/1/48 to dismiss 2nd count of plf's compl for lack juris.

Nov. 1—Fld plf's pts & auths re dft's mo to dismiss 2nd ct of compl. Fld plf's mo to strike part of compl. Ent ord denying both mos, dft to hv 10 da to ans.

Nov. 10—Fld dft's answer & counterclaim.

Nov. 20—Fld reply plf's Wm J Dubil & E J Hubik to dft's counterclaims.

Dec. 6—Ent ord setting trial 3/8/49.

1949

Jan. 11—Fld defts Not of takg depositions.

Feb. 7—Fld defts Notice re: use patents during trial.

Feb. 8—Fld defts interrog.

Feb. 17—Fld pltf's interrog.

Feb. 19—Fld Stip & ord that pltf's may file amend reply. Fld plf's objects to defts interogs with not of hrg thereon, ret 2/28/49.

Feb. 23—Fld defts Not of takg depositions of Edw. Munion.

Feb. 24—Fld defts memo of pts & auths in oppos to pltf's objects to interrog. Fld answers to certain of defts interrog of pltf's Earl F. Shores & Edw. J. Hubik.

1949

- Feb. 28—Fld ea 3 depos Rayford Camp takn 1/18, 1/27, 2/11/49. Fld plfs answs to certain dfts interrogs. Fld plfs reply auth re plfs objs to dfts interrogs. Ent ord overrulg objs 5-A, 7/10 incl & 16; & sust objs 5-B, 5-C, 11/15 incl, 17/28 incl. Ent ord vacatg settg 3/8/49 & ent ord settg trial 3/28/49 bef J. Cavanah.
- Mar. 2—Fld depos of Earl Floyd Shores takn 1/18/49. Fld depos of Edw. Joseph Hubik, takn 1/19/49. Fld depos of Walter Thomas Carey, takn 2/25/49.
- Mar. 7—Fld sealed envelope, depos of Wm H. Sloan tkn behalf plfs.
- Mar. 8—Fld defts, Rayford Camp Co & Rayford Camp, answer to amend compl & counterclaim.
- Mar. 10—Fld pltfs answers to defts interrog V (a), VII, VIII, IX, X & XVI.
- Mar. 11—Fld Stip & ord re: flg amend compl. Fld Amend Compl. Fld pltfs Not & Mot retble 3/21/49 to strike.
- Mar. 14—Ent ord deft answ plfs interrogs by 3/18/49. Ent ord settg mot plf for inspection for hrg e/17/49 at 1 PM. Fld pltfs mot to inspect. Fld stip & ord amended reply pltfs to counterclaims shall be takn to be reply of last-mentioned pltfs

1949

to the counterclaims set forth in defts answer to amend compl & counterclaim, defts Rayford Camp & Co.

Mar. 16—Fld defts memo in oppos to pltfs mot to strike.

Mar. 17—Fld defts memo in oppos to pltfs mot to inspect. Fld Stip re: copies of letters patent, offered in evid, etc. Ent procs hrg mot pltf fld 3/14/49 for ord of insp. Ent ord grantg mot & ent ord on mot dft that similar inspect may be md of plfs process, on same conds.

Mar. 18—Fld defts answers to pltfs interrog.

Mar. 18—Fld order re: inspec of plants.

Mar. 21—Ent ord amending paragraph "M" dfts answ to amended compl by interlineation; & ent ord denying mot plfs to strike said parag & ent ord parag as amended remain.

Mar. 25—Fld depos of Wm. J. Dubil taken 1/27/49

Mar. 28—Ent proc on court trial before Judge Cavanah, and ent ord contg to 3/29/49, further court trail. Sw. 3 wits for plf. Fld. 1 plf ex.

Mar. 29—Ent proc on further court trial and ord contg to 3/30/49, further court trial. Sw. 1 wit for plf. Fld 6 plf's exs.

1949

Mar. 30—Ent proc on further court trial and ord
contg to 3/31/49, further court trial. Sw.
2 wits for plf.

Mar. 31—Ent proc on further court trial and ord
contg to April 1, 1949, further court trial.
Sw 4 wits for plf. Fld 5 exs for plf.

Apr. 1—Ent proc on further court trial and ord
contg to April 4th, 1949, further court
trial. Sw 1 wit for plf. Sw 1 wit for deft.
Fld 9 exs for plf.

Apr. 4—Ent proc on further court trial and ord
contg to 4/5/49, further court trial. Sw.
1 wit. for plf. Fld 6 exs for plf. Enter
order for and returned plf. Ex 11 for
ident (thermometers in case) to counsel
for plf and obtained receipt therefor on
file cover. Ent proc on Pet od counsel for
plf for OSC re contempt on deft Rayford
Camp and ent order denying at this time.
Lodged Petition for order to show cause
re contempt of Rayford Camp and lodged
form of Order not signed by the court.
Filed deft's objections to plf's interrogs
to William H. Sloan.

Apr. 5—Ent proc on further court trial and ord
contg to April 6th, 1949, further court
trial. Sw. 1 wit for defts. Fld 19 exs for
defts. Ent order for, and returned to

1949

counsel for plf., for destruction, plfs, exs 4, 7, 8, 9, 17, 18, 19, 20, 21 and 22 (meat exhibits) in contaminated condition.

Apr. 6—Ent proc on further court trial, and ord contg to April 7th, 1949, further court trial. Sw. 3 wits for defts. Fld 3 exs for plfs. Fld 3 exs for defts.

Apr. 7—Ent proc on further court trial and ord submitting on briefs to be filed by each side simultaneously in 10 days, and on briefs to be filed by each side simultaneously within 7 days thereafter. Fld 3 exs for plfs. Fld 4 exs for defts.

Apr. 18—Fld plfs brief. Fld defts Brief.

Apr. 25—Fld answering brief of deft. Fld plfs reply brief.

May 3—Fld repts transe predgs 3/28/49, 3/29, 3/30, & 3/31, 4/1, 4/4, 4/5, & 4/6, & 4/7. (8vols).

May 23—Filed opinion of Judge Cavanah and ent order, pursuant thereto, in favor of the defendants and for counsel for the defendants to prepare Findings and Judgment. Mailed copy of Opinion to Attorney General, and to counsel on each side.

July 11—Fld 9 vols reporters transcript of proc of 3/28/49, 3/29/49, 3/30/49, 4/1/49, 4/4/49, 4/5/49, 4/6/49, 4/7/49, respectively.

1949

July 11—Fld stip & ord pltfs hv to & incldg 7/22/49
to file objecs to findgs & judgmt.

July 12—Fld reptrs transe predgs 4/7/49.

July 22—Fld plfs petn. Fld affid Donald C. Russell
re: prior decisions of this ct. Fld affid
Donald C. Russell re: prior predgs in this
case. Fld affid Russell re: Harris, Kiech,
Foster & Harris brief on attys fees. Fld
plfs objecs to defts prop findgs, etc. Mld
orig to Jdg Cavanah.

July 27—Fld defts memo with respect to plfs affids,
petn & objecs to prop findgs, etc. Mld orig
to Jge Cavanah.

July 29—Fld reply by plfs to defts memo re objecs
to prop findgs, etc., & judgt.

Aug. 4—Fld finds fact & concls law & fld & ent
JBK 59/703 that US Pat 2,052,221 etc.
is invalid & void & that Trade-Mark Regis
20515 etc is invalid & void; that deft Ray-
ford Camp has not infringed plfs trade-
mark or engaged in unfair compet, etc.,
and dismiss compl & amend compl & deft's
counterclaim, & judgmt favor deft Ray-
ford Camp for \$15,000.00 atty fees & costs.
Dktd. Not attys. Made JS 6. Made final
Pat rept.

Aug. 16—Fld prae for & issd abstr judgmt.

1949

Aug. 16—Fld plts not of hrg of petn to fix amt of supersedeas bond. Fld ord shorten time hrg. petn retble 8/18/49 10 am. Fld petn to stay exec on judgt. Fld affid of C. G. Stratton.

Aug. 17—Fld defts memo with respect to plfs ptn to fix amt of supersedeas bond.

Aug. 18—Ent procs hrg mot plfs to fix amt supersed bd on app. Ent ord plfs file supersed bd on app in amt \$1000 accompanied by stmt plfs under oath to effect that during pend app they will not without approval et etc dispose of business etc. Ent ord exec jgmt stayed till 5 pm, 8/25/49 & pfs hv till then to file bd & affs.

Aug. 24—Fld order re: supersedeas bond on appeal in amt \$1000.

Aug. 25—Fld plfs not of appeal with recpt svce thereon. Fld supersedeas bond amt \$1000. Fld statmt Earl F. Shores in connection with supersedeas bond. Fld statmt of Edw. J. Hubik. Fld statmt of Wm. J. Dubil.

Aug. 27—Fld desig of contents of record on appeal.

Sept. 1—Fld reptrs transe predgs. 8/18/49.

Oct. 3—Fld stip and ord that plfs hv to & incldg 11/22/49 to file and dkd rec on appeal.

DEFENDANTS' EXHIBIT S

In the United States District Court, Southern
District of California, Central Division

No. 247-B Civil

WILLIAM J. DUBIL and EDWARD J. HUBIK,
Plaintiffs,

vs.

DAVE LANDAU and BENJAMIN LEVY, a co-
partnership, doing business under the fictitious
name of EASTERN TENDERIZED STEAK
COMPANY,

Defendants.

FINAL DECREE

This cause coming on to be heard at this term
of Court, and upon consideration thereof, it is
Ordered, Adjudged and Decreed, as follows:

1. That United States Letters Patent No. 2,052,-
221, dated August 25, 1939, being the Letters Patent
in suit, are good and valid in law.
2. That the plaintiffs are the sole and exclusive
owners of the entire right, title and interest in and
to said Letters Patent No. 2,052,221.
3. That the defendant Benjamin Levy, has not
violated the rights of said plaintiffs under said
Letters Patent.

Done In Open Court this 11th day of March,
1940.

/s/ C. E. BEAUMONT,
U.S. District Judge.

Approved By:

.....,
David B. Head,
Court Commissioner and
Special Master.

Approved As To Form:

/s/ SAUL J. BERNARD,
Attorney for defendant,
Benjamin Levy.

Judgment entered Mar. 11, 1940.

Docketed Mar. 11, 1940.

Admitted April 7, 1949.

DEFENDANTS' EXHIBIT T

In the United States District Court, Southern
District of California, Central Division
No. 247-B Civil

WILLIAM J. DUBIL and EDWARD J. HUBIK,
Plaintiffs,

vs.

DAVE LANDAU and BENJAMIN LEVY, a co-
partnership, doing business under the fictitious
name of EASTERN TENDERIZED STEAK
COMPANY,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

I.

That the ownership of U.S. Letters Patent No. 2,052,221, issued August 25, 1936, is admitted as being in the above named plaintiffs.

II.

That the said Letters Patent cover a method of preparing fresh meat by which very thin slices of fresh meat may be produced; that the defendants, during several months immediately preceding the filing of this case, were co-partners, doing business under the firm name of Eastern Tenderized Steak Company, in the city of Los Angeles, state of

California; that the defendant Benjamin Levy, did not prepare, or cause to be prepared, fresh meat in a manner covered by any of the claims of said patent, and has not sold or caused to be sold within the state of California, or elsewhere, very thin slices of fresh meat prepared by the method covered by the claims of said Letters Patent.

Conclusions of Law

I.

That the plaintiffs herein are the owners of U.S. Letters Patent No. 2,052,221, issued August 25, 1936.

II.

That claims "1 and 2," to "6" inclusive, of said patent, disclose patentable invention and are valid.

III.

That it has not been established that the said defendant, Benjamin Levy, has infringed any of the claims of said patent.

Done In Open Court this 11th day of March, 1940.

/s/ C. E. BEAUMONT,
U.S. District Judge.

Approved By:

.....,
David B. Head,
Court Commissioner and
Special Master.

Approved As To Form:

/s/ HAL R. CLARK,
Atty. for defendants.

By /s/ SAUL J. BERNARD,
Attorneys for defendant,
Benjamin Levy.

[U.S. District Court Seal]

Admitted April 7, 1949.

DEFENDANTS' EXHIBIT U

In the United States District Court for the Southern
District of California, Central Division

No. 247-C Civil

WILLIAM J. DUBIL, and EDWARD J. HUBIK,
Plaintiffs,

vs.

DAVE LANDAU and BENJAMIN LEVY, a co-
partnership, doing business under the fictitious
name of EASTERN TENDERIZED STEAK
COMPANY,

Defendants.

REPORT OF SPECIAL MASTER

To the Honorable Judges of the United States
District Court, Southern District of California,
Central Division:

The above entitled case was referred to the under-

Defendants' Exhibit U—(Continued)

signed as special master for hearing and reporting to the Court. An amended answer was filed May 15, 1939. The case was set down for the taking of testimony on May 22, 1939. At that time the following appearances were made: Carlos G. Stratton, Esq. and Hal R. Clark, Esq. for the plaintiffs and Saul J. Bernard, Esq. for the defendants. When the case was called, the defendant Dave Landau, appearing for himself, discharged his counsel of record. Counsel thereupon withdrew. Defendant Landau thereafter entered into a stipulation with plaintiffs whereby he admitted validity of the patent in suit and that he had infringed the patent. A consent decree followed and was filed May 26, 1939. The case then proceeded against the defendant Benjamin Levy as an individual. Hereafter he is referred to as the defendant. The master now reports to the Court:

This is an action for infringement of Letters Patent No. 2,052,221 entitled "Method of Preparing Fresh Meat". The patent was issued to William J. Dubil, the applicant, and Edward J. Hubik, the assignee of a one half interest.

The Patent In Suit

The patent describes a method of preparing very thin slices of meat. The object of this is to cut through the fibers of the meat so that when several of the thin slices are placed together to make a steak the resultant product is tender. In this manner the

Defendants' Exhibit U—(Continued)

cheaper and tougher cuts of meat can be utilized to better advantage.

The process is not complicated. A boneless piece of meat, or several pieces compressed together are subjected to temperatures of 18° to 25° for 48 hours or until the meat is frozen solid. The next step is to remove the solidity by partial thawing. This is done by subjecting the meat to temperatures of approximately 30° to 32° for 12 hours. Variations in time and temperature may be made depending upon the fatty content of the meat.

After the last step known as "tempering" the meat is of the proper consistency for slicing. This is done upon the ordinary slicing machine commonly seen in butcher shops. The meat is cut into slices of a thickness known as "No. 2". This is a very thin slice about that of chipped beef. Several slices are then put together to form a single steak or many slices may be compressed into a loaf. This is the finished product.

The following language in the patent is noted (p. 1, 11 9-14)

"Subjecting the meat to these temperatures for a week's time or more would chill the meat throughout to the desired consistency for slicing. However, to cut down the time for preparation, I freeze the meat solid first and then thaw out to said desired temperatures."

There are 6 claims in the patent. All but claim 2

Defendants' Exhibit U—(Continued)

are in issue. All are drawn to the three steps outlined above. Claim 1 is the broadest:

"1. The method of preparing fresh meat, comprising first freezing the meat solid throughout, then thawing the meat to approximately 30° to 32°F. throughout, and then slicing same into very thin slices."

Claim 3 adds a fourth step to the process:

"3. The method of preparing fresh meat, comprising first freezing the meat solid, then thawing the meat to approximately 30° to 32°F. throughout, slicing same into very thin slices, compressing the slices into a mass of desired shape, and freezing the mass."

Claims 4 and 5 follow Claims 1 and 3 except that a freezing temperature of approximately 18° to 25° is specified.

"4. The method of preparing fresh meat, comprising: subjecting the meat to a temperature between approximately 18° to 25°F., depending on its fatty consistency, for a period of approximately 48 hours, then thawing the meat to approximately 30° to 32°F. for approximately 12 hours, and then slicing same into very thin slices."

"5. The method of preparing fresh meat comprising: compressing together separate pieces of fresh meat, subjecting the meat to a temperature between approximately 18° to 25°F., depending upon its fatty content, for a period of approximately 48

Defendants' Exhibit U—(Continued)

hours, then thawing the meat to approximately 30° to 32°F. for approximately 12 hours, slicing same into very thin slices, compressing the slices into a desired shape, and then freezing the mass into a loaf.”

Claim 6 is more specific as to the thickness of the slice:

“6. The method of preparing fresh meat comprising: freezing the entire mass of fresh meat, including the central part thereof, then thawing the meat for a relatively long interval, to wit, a number of hours, until the entire mass thereof has been raised to a substantially non-frozen condition throughout, to wit, to approximately 30° to 32°F., and then slicing the meat into very thin slices of approximately the thickness of “chipped” beef.”

In slicing meat to the thickness specified the problem is to obtain slices of uniform thickness in an unmutilated form. If sliced while frozen, say at 26°, uneven slices and wedge shaped slices are produced. Sliced at temperatures above 33° the meat tends to pull apart with a ragged, uneven slice resulting. The most satisfactory results are obtained by using temperatures between 30° and 32°.

The Prior Art

Some evidence was offered tending to prove that as early as 1932 the defendant, Benjamin Levy, while engaged in the butcher business in New York City cut frozen meat into thin slices, put them

Defendants' Exhibit U—(Continued)

together into steaks and sold them. The evidence must be rejected as insufficient to establish the fact. However, if he did practice such a process it was known only to him and was not available to the art and consequently not a part of the art. The same applies to an alleged use at Fredericks Market, Hollywood, California.

Since the hearing of the case the record has been enlarged by the filing of certain papers from the Patent Office proceedings and copies of patents cited by the examiner during the prosecution of the application. These documents have been marked defendants exhibits E to J inclusive. The claims were allowed as presented in the application. The cited patents place no limitations on the claims when read in view of the specifications. Both the freezing and cutting of meat is, of course, old in the art.

The amended answer setting up prior use and invention by Benjamin Levy was filed too late in view of Sec. 4920R.S. to permit consideration of evidence of such prior use and invention as showing anticipation.

It appears that the patentee Dubil was the first to disclose a process whereby very thin slices of meat were produced for the purposes stated in the patent. The patent is presumptively valid and no evidence has been offered that overcomes that presumption.

Defendants' Exhibit U—(Continued)

The Defendant's Process

Within five months prior to the filing of this action, the defendants Levy and Landau were engaged in business as the Eastern Tenderized Steak Company. They sold a product made up of several thin slices of beef compressed together to form a steak. Prior to the trial of this case before the master the partnership was dissolved.

For proof of defendant's process plaintiffs rely on (1) the admissions made by the codefendant Landau in the stipulation filed May 26, 1939, (2) the identity of the product and (3) admissions of defendant Levy and his counsel (Plaintiffs Points and Authorities—pp 2-8).

The first contention must be rejected. The stipulation of May 26, 1939 in which Landau admits infringement was entered into after the dissolution of the partnership. It is the rule that admissions made by a co-partner after dissolution of the partnership in regard to past transactions do not charge his copartners. *Thompson vs. Bowman*, 6 Wall. 316, 18 L.Ed. 736. In that case Justice Field said:

“His admission of liability or of an agreement upon which liability might follow possessed no greater efficacy to bind his former copartners than a similar admission of any other agent of the co-partnership after his agency had terminated.”

The second point raises a question of the weight to be given evidence. “Identity of product is some evidence of identity of the process of manufactur-

Defendants' Exhibit U—(Continued)

ing.” Daniel Green Felt Shoe Co. vs. Dolgeville Felt Shoe Co., 205 Fed. 745. But standing alone it does not constitute proof of infringement. Bene vs. Jeantet, 129 U.S. 683, 32 L.Ed. 803.

From the testimony of the witnesses the defendant's process is found to have consisted of the following steps: (1) cuts of beef were placed in a refrigerator for a period of 12 to 24 hours. When in the judgment of Mr. Levy a piece of meat was ready for slicing he removed that piece from the refrigerator. He determined this by pressing his thumbnail into the meat. (2) The meat was placed in a slicing machine and sliced into very thin slices, approximately No. 2. (3) Several slices were then placed together and compressed to form a small steak. When wrapped the product was ready for market.

Samples of both plaintiffs' and defendant's product were offered in evidence (Exhibit 2 is defendant's product, Exhibit 5 is plaintiffs'). The several steaks received in evidence were turned over to the plaintiffs for freezing and preservation. They are available for the Court's inspection.

Defendant's product is made up of seven to ten thin slices of meat. The slices appear to be of uniform thickness but differ in size and shape. Plaintiffs' product is made up of uniform slices. Otherwise there is little difference in the two products.

Infringement

Defendants, as heretofore found, does not carry the first step of his process further than to chill the

Defendants' Exhibit U—(Continued)

meat to a temperature at which it may be sliced into thin slices. This is probably in the range of 30° to 33°. He does not freeze the meat and then thaw to the temperature at which it is sliced. It follows that the defendant does not carry the first step of the process of the patent to completion. The second step of the patented process is not used. The third or slicing step is substantially used by the defendant.

The omission of an element, essential or not, avoids infringement. *Wright vs. Yuengling*, 155 U. S. 47, *Union Water Meter Co. vs. Desper*, 101 U.S. 332. *Lincoln vs. Waterbury Button Co.*, 291 Fed. 594 (aff. 297 Fed. 619). Infringement has been found in cases on process patents where additional steps were added, one step divided into two or more steps, or steps reversed or transported. However no case has been found holding infringement where a step is wholly omitted—see 48 C.J. p 317 et seq. and cases there cited. Even though limitations were unnecessarily written into the claim, if clear, they must prevail. *Philadelphia Rubber Works vs. Portage Rubber Co.* 241 Fed. 108.

Plaintiffs point out that the patent describes chilling of the meat to a desired temperature without freezing and subsequent thawing (patent p 1, 1 9-14). No claim was drawn to cover such a procedure. In *McClain vs. Ortmayer*, 141 U.S. 419, 423 Justice Brown said:

“- - - while the specification may be referred to

Defendants' Exhibit U—(Continued)

to limit the claim, it can never be made available to expand it.”

In *Rip Van Winkle Wall Bed Co. vs. Murphy Wall Bed Co.*, 1 Fed. (2) 673, 678, the Circuit Court of Appeals for the Ninth Circuit said:

“- - - anything disclosed but not claimed is dedicated to the public.”

As heretofore pointed out the defendant does not freeze the meat and then raise it to the temperature for slicing. He does not follow the first step of the patent claims and he omits the second step. Further there was no evidence that defendant froze a mass or loaf of slices. This is a fourth step covered by claims 3 and 5.

It follows that the defendant has not infringed the claims of plaintiffs patent here in issue.

Conclusions

(1) That this is a civil action under the patent laws of the United States over which this Court has jurisdiction.

(2) That title to Letters Patent No. 2,052,221 is vested in the plaintiffs William J. Dubil and Edward J. Hubik.

(3) That said Letters Patent are good and valid in law.

(4) That the defendant has not infringed said Letters Patent.

Defendants' Exhibit U—(Continued)

Recommendation

That a decree be entered in conformity with this report.

Respectfully submitted,

/s/ [Illegible]

Special Master.

[Endorsed]: Filed Aug. 30, 1939.

[U.S. District Court Seal]

Admitted April 7, 1949.

UNITED STATES PATENT OFFICE

2,052,221

METHOD OF PREPARING FRESH MEAT

William J. Dubil, Los Angeles, Calif., assignor of one-half to Edward J. Hubik, South Gate, Calif.

No Drawing. Application September 13, 1935,
Serial No. 40,416

6 Claims. (Cl. 99—194)

My invention relates to a method of preparing meat for the trade, and more particularly to a method of preparing very thin slices of fresh meat.

If fresh meat is within the temperature range at which it is usually kept in a butcher shop for retail trade, it is too soft to be sliced very thin with the automatic meat slicer ordinarily used in butcher shops. The result is that the slicer tears the fibers apart instead of slicing through them, and hence does not function properly on fresh meat. If very thin slices are desired.

If the meat is frozen solid, it has been found too hard to be sliced in a slicer of the character mentioned.

An object of my invention is to prepare fresh meat whereby it may be sliced in one of said ordinary, automatic slicers, and by such means produce very thin slices of fresh meat.

Another object of the invention is to provide a method for taking tough, cheap cuts of fresh meat and slicing it very thin to render it tender and appetizing, and thus saleable at a higher price.

Still another object is to provide a loaf of fresh meat, ready sliced in very thin slices, which have been frozen together in a loaf shaped in section to simulate T-bone, rib, porterhouse steaks, or the like.

Further objects will appear in the course of the following description.

Referring more in detail to my invention, the first step in my method is to take either (a) a single piece of boneless, fresh meat the desired size, or (b) smaller, odd-sized pieces of boneless, fresh meat, which pieces are compressed into a loaf. If the second step is followed, the smaller pieces may all be of the same variety of meat, or they may be different varieties; to wit, pieces of pork, beef, lamb and/or veal compressed together.

It is important that the meat be boneless since the ordinary butcher shop is not equipped with slicers capable of cutting through bone and at the same time automatically slice very thin slices.

Irrespective of whether step (a) or (b) is the first step, the single piece of meat or the compressed loaf of smaller pieces is then frozen.

The meat is frozen sufficiently for it to have rigidity to resist tearing of its fibers, but softness enough to permit it to be sliced on one of said ordinary slicers. To produce this particular result, the meat should be from 30° to 32° (all temperatures mentioned herein are Fahrenheit), and approximately the same temperature throughout

the mass. The range of 30° to 32° is to take care of meat having different proportions of fat. For lean meat, approximately 32° throughout has been found satisfactory. For meat containing considerable fat, approximately 30° throughout has been found satisfactory. The range between these two temperatures is for successive proportions of fat to lean.

Subjecting the meat to these temperatures for a week's time or more would chill the meat throughout to the desired consistency for slicing. However, to cut down the time for preparation, I freeze the meat solid first and then thaw out to said desired temperatures.

Satisfactory results have been produced by 15 subjecting the meat to temperatures of 18° to 25° for 48 hours, the temperature again depending upon the fatty content of the meat. However, lower temperatures may be used for correspondingly shorter periods, if desired, the function of this step being to freeze the meat solid.

The next step is to remove the solidity from the meat by partially thawing. I have found 20 that meat kept from 18° to 25° for 48 hours may be brought to the desired consistency by subjecting it to approximately 30° to 32° overnight (e. g., 12 hours), depending again on the fatty content of the meat.

The single piece of fresh meat or loaf of fresh meat is now the proper consistency to be sliced 30 very thin by an ordinary automatic slicing machine commonly used in butcher shops. The thickness is known as a "No. 2" slice by those skilled in the trade, and is about the thickness of what is known in the trade as "chipped beef." 35

The slicing operation is preferably done at a freezing temperature (32°), or less, in order that the thin slices may not thaw out further and lose their natural juices.

In practice these slices are stacked up, and 40 four to six of these thin slices are used as a single steak. They may now be sold and used, or such steaks may be wrapped around and/or pierced by a skewer, and sold and used.

However, it is preferred to compress the slices into a loaf while at said freezing temperature. 45 The loaf may be the shape of T-bone, rib or porterhouse steaks, or may be the shape of a bun, etc. The loaf is then frozen again, and is now 50 ready for sale. Restaurants especially like meat in this form, for they may keep the loaves in their cooler and slice them down as needed.

It is to be understood that changes may be made in the details of the invention described 55

above, without departing from the spirit and scope of the invention.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:

1. The method of preparing fresh meat, comprising first freezing the meat solid throughout, then thawing the meat to approximately 30° to 32° F. throughout, and then slicing same into very thin slices.

2. The method of preparing fresh meat, comprising first freezing the meat solid, then thawing the meat to approximately 30° to 32° F. throughout, and then slicing same into very thin slices at a freezing temperature.

3. The method of preparing fresh meat, comprising first freezing the meat solid, then thawing the meat to approximately 30° to 32° F. throughout, slicing same into very thin slices, compressing the slices into a mass of desired shape, and freezing the mass.

4. The method of preparing fresh meat, comprising: subjecting the meat to a temperature between approximately 18° to 25° F., depending on its fatty consistency, for a period of approxi-

mately 48 hours, then thawing the meat to approximately 30° to 32° F. for approximately 12 hours, and then slicing same into very thin slices.

5. The method of preparing fresh meat comprising: compressing together separate pieces of fresh meat, subjecting the meat to a temperature between approximately 18° to 25° F., depending upon its fatty content, for a period of approximately 48 hours, then thawing the meat to approximately 30° to 32° F. for approximately 12 hours, slicing same into very thin slices, compressing the slices into a desired shape, and then freezing the mass into a loaf.

6. The method of preparing fresh meat comprising: freezing the entire mass of fresh meat, including the central part thereof, then thawing the meat for a relatively long interval, to wit, a number of hours, until the entire mass thereof has been raised to a substantially non-frozen condition throughout, to wit, to approximately 30° to 32° F., and then slicing the meat into very thin slices of approximately the thickness of "chipped" beef.

WILLIAM J. DUBIL.

PLAINTIFFS' EXHIBIT No. 16

State of California

Office of the

Secretary of State

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That on the 14th day of September, 1936, Edward J. Hubik, 3251 Firestone Boulevard, South Gate, County of Los Angeles, State of California, filed in this office a Claim to the Trade Mark "Chip Steak."

I further certify it is set forth in the said Claim that said Edward J. Hubik is located and doing business at said address, being engaged in the business of preparing and selling meat and has adopted for his use a Trade Mark consisting of the words "Chip Steak" which is imprinted upon waxed paper in which slices of meat is wrapped and with which the meat is displayed.

I further certify that on said date the Secretary of State issued his official certificate of registration of said Trade Mark, numbered 20515, under the Great Seal of this State.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of the State of California this 21st day of January, 1949.

/s/ FRANK M. JORDAN,

Secretary of State.

By /s/ CHAS. J. HAGERTY,

Deputy.

[The Great Seal of the State of California]

Admitted March 31, 1949.

8649-3 air
 Exhibit vs. Raymond Cook
 No. 12 IDENTIFICATION
 Date 4/1/49 No. 22 IN EVIDENCE
 District Court, Southern District of California
 Clerk

8649-3 air
 Exhibit vs. Raymond Cook
 No. 12 IDENTIFICATION
 Date 4/1/49 No. 12 IN EVIDENCE
 District Court, Southern District of California
 Clerk

CHIP STEAKS BEEF CHIP
 CHIP STEAK CO.
 4181 So. Main St.
 Los Angeles, Calif.
 3 lbs. Hot Wt.
 CA
 INSPECTED
 AND PASSED BY
 DEPT. OF HEALTH
 1-4914
 4181
 3

S BEEF CHIP STEAK
 CHIP STEAK CO.
 4181 So. Main St.
 Los Angeles, Calif.
 3 lbs. Hot Wt.
 CA
 INSPECTED
 AND PASSED BY
 DEPT. OF HEALTH
 1-4914
 4181
 3

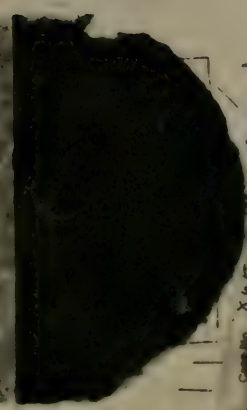
CHIP STEAKS BEEF
 CHIP STEAK CO.
 4181 So. Main St.
 Los Angeles, Calif.
 3 lbs. Hot Wt.
 CA
 INSPECTED
 AND PASSED BY
 DEPT. OF HEALTH
 1-4914
 4181
 3

CAMP STEAK
 FROZEN
 LAMP & CO. LOS ANGELES, CALIF.
BEEF STEAK



Date 4/1/49 20
 Check U.S. Treasury Dept. Order No.
Carson Dubil in Hayward Camp #61
 8047-5 air

CHIP STEAKS
 COLD STEAKS ON OR OFF SKEWERS
 FOR APPETIZERS & MAIN COURSE



Date 4/1/49 18
 Check U.S. Treasury Dept. Order No.
Carson Dubil in Hayward Camp #61



Qty. 47
Date 4/1/49
Chk. 8649-8 in Lab. H. J. 100-2



Qty. 21
Date 4/1/49
Chk. 8649-8 in Lab. H. J. 100-2

PLAINTIFFS' EXHIBIT No. 27

In the United States District Court, Southern
District of California, Central Division

No. 247-C Civil

WILLIAM J. DUBIL and EDWARD J. HUBIK,
Plaintiffs,

vs.

DAVE LANDAU and BENJAMIN LEVY, a Co-
partnership, doing business under the fictitious
name of EASTERN TENDERIZED STEAK
COMPANY,

Defendants.

FINAL DECREE

This cause coming on to be heard at this term of
Court, and upon consideration thereof, it is

Ordered, Adjudged and Decreed as follows:

1. That United States Letters Patent No. 2052,-
221, dated August 25, 1936, being the Letters Patent
in suit, are good and valid in law.
2. That the plaintiffs are the sole and exclusive
owners of the entire right, title and interest in and
to said Letters Patent No. 2052,221.
3. That the defendant Dave Landau, one of the
copartners in the Eastern Tenderized Steak Co., has
infringed upon claims 1 and 3 to 6, inclusive, of said
Letters Patent, and each of them, and has violated

the exclusive rights of said plaintiffs thereunder by using the method or process covered thereby and by selling very thin slices of fresh meat prepared by said method or process, all within the City of Los Angeles, County of Los Angeles, State of California, within the six (6) years next preceding the filing of this suit.

4. That a Writ of Injunction issue out of and under the Seal of this Court, directed to the defendant Dave Landau, perpetually enjoining and restraining the said defendant, his associates, attorneys, clerks, servants, agents, workmen, employees and confederates, and each of them, from directly or indirectly practicing, causing to be practiced, or threatening to practice the method or process covered by claims 1 and 3 to 6, inclusive, of said Letters Patent, or any of them, and from directly or indirectly selling the product of such method or process, and from in anywise infringing said Letters Patent and contributing to the infringement of said Letters Patent by others and conspiring with others to so infringe said Letters Patent, in any way whatsoever.

Done In Open Court this 26th day of May, 1939.

/s/ G. COSGROVE,

U.S. District Judge.

Approved By:

/s/ DAVID B. HEAD,

Court Commissioner and
Special Master.

Approved As To Form:

/s/ IRWIN H. ROTH,
Attorney for defendant
Dave Landau.

Judgment entered May 26, 1939.

Docketed May 26, 1939.

[U.S. District Court Seal.]

Admitted April 4, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 195, inclusive, contain the original Bill of Complaint; Notice of and Motion to Dismiss the Second Count of Plaintiff's Complaint for Lack of Jurisdiction; Plaintiffs' Motion to Strike Part of Complaint; Answer and Counter-Claim of Defendants Rayford Camp & Co. and Rayford Camp; Notice Under 35 U.S.C. 69; Defendants' Interrogatories Under Rule 33; Plaintiffs' Interrogatories Under Rule 33; Stipulations re and Amended Reply of Plaintiffs William J. Dubil and Edward J. Hubik to Counterclaims of Defendants; Separate Answers of Plaintiffs to Certain of Defendants' Interrogatories; Answer to Amended Complaint and

Counterclaim of Defendants Rayford Camp & Co. and Rayford Camp; Plaintiffs' Separate Answers to Defendants' Interrogatories V(a), VII, VIII, IX, X and XVI; Stipulation and Order re Amended Complaint; Stipulation and Order re Amended Reply; Stipulation re uncertified copies of Patents; Order re Inspection of Plaints; Defendants' Answers to Plaintiffs' Interrogatories; Defendants' Objections to Plaintiffs' Interrogatories to William H. Sloan; Petition for an Order to Show Cause Why Defendant Rayford Camp Should Not be Held in Contempt of Court and be Punished Accordingly; Form of Order re Contempt; Opinion; Objections to Defendants' Proposed Findings of Fact and Conclusions of Law and Judgment; Affidavit of Donald C. Russell re Prior Decisions of this Court; Affidavit of Donald C. Russell re Prior Proceedings in this Case; Affidavit of Donald C. Russell re Harris, Kiech, Foster and Harris Brief re Attorney's Fees; Findings of Fact and Conclusions of Law; Judgment; Affidavit of C. G. Stratton; Order re Supersedeas; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and full, true and correct copies of Minute Orders Entered November 1, 1948, March 28, 29, 30, and 31 and April 1, 4, 5, 6 and 7, 1949 and of the Docket Entries which, together with the original reporter's transcript of proceedings on March 28, 29, 30, and 31 and April 1, 4, 5, 6 and 7, 1949, in nine volumes, and original plaintiffs' exhibits 1, 2, 3, 5, 6, 10, 12-16, 23-36 and original de-

fendants' exhibits A-F, F-1, F-2, F-e, F-4, F-5, F-6, G-U, all inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$8.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 18 day of November, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing documents are the original Plaintiffs' Points and Authorities re Defendants' Motion to Dismiss the Second Count; Notice and Plaintiffs' Objections to Defendants' Interrogatories; Motion to Strike and Points and Authorities; Motion to Inspect and Points and Authorities; Memorandum of Defendants with Respect to Plaintiffs' Affidavits, Petition, and Objections to Proposed Findings of Fact and Conclusions of Law; Petition to Stay Execution of Judg-

ment; Notice of Hearing and Petition to Fix Amount of Supersedeas Bond and Petition by the Plaintiffs which constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 21st day of December, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12403. United States Court of Appeals for the Ninth Circuit. William J. Dubil, Edward J. Hubik and Earl F. Shores, Appellants, vs. Rayford Camp & Co., and Rayford Camp, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12403

WILLIAM J. DUBIL, EDWARD J. HUBIK, and
EARL F. SHORES,

Appellants,

vs.

RAYFORD CAMP & CO., RAYFORD CAMP,
JOHN DOE, JANE DOE, and JOHN DOE
CO.,

Appellees.

STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

Come now the above-named appellants and show this Honorable Court that upon appeal these appellants will rely upon the following errors of the Lower Court:

I.

That the Lower Court erred in holding that it had jurisdiction to try and in trying the second, further and additional cause of action set forth in the Complaint in this case.

II.

The Lower Court erred in not granting the defendants' "Motion to Dismiss the Second Count of Plaintiffs' Complaint for Lack of Jurisdiction."

III.

The Lower Court erred in assessing any attorneys' fees whatever in this case.

IV.

The Lower Court erred in paragraph XXXII of the Findings in finding that defendants' attorneys have been required to attend numerous contested motions prior to trial, or that any pre-trial was conducted in this case, and erred in finding that "numerous" depositions and plant inspections requiring their attendance were conducted, and erred in finding that this action by plaintiffs was unjustifiably filed or prosecuted or was unreasonably prolonged.

V.

The Lower Court erred in paragraph XXXII of the Findings in finding that either Twenty Thousand Dollars (\$20,000.00) or Twelve Thousand Dollars (\$12,000.00) (the Court was apparently undecided as to which sum he wanted to assess) is a reasonable sum for attorneys' fees and costs in this action; that the Lower Court abused its discretion in such finding without any showing whatever as to what a reasonable attorneys' fee would be in this case; and the Lower Court erred in not having the actual costs taxed, as is the practice in the Lower Court, instead of lumping them together with the attorneys' fees without any proof whatever as to what the actual costs were.

The Lower Court erred in paragraph XV of the Findings in finding that the art pleaded in the pres-

ent case was not before the Court in *Dubil v. Landau and Levy*, No. 247-B; erred in not finding that the subject matter of two of the four prior patents relied upon here were before the Court in *Dubil v. Landau and Levy*; and erred in not holding that the Court previously held the patent in suit valid in a contested case in its decree against Levy in said case.

VII.

The Lower Court erred in paragraph XIV of the Conclusions, in concluding that the defendant Camp is entitled to recover attorneys' fees and costs in the amount of Fifteen Thousand Dollars (\$15,000.), or any other amount, or that Fifteen Thousand Dollars (\$15,000.00) is a reasonable amount for such.

VIII.

The Lower Court erred in paragraph VII of the Judgment, in adjudging that the defendant shall recover attorneys' fees and costs in the sum of Fifteen Thousand Dollars (\$15,000.00), or any other amount.

Dated in Los Angeles, California, this 10th day of November, 1949.

/s/ C. G. STRATTON,

Attorney for Appellants.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD MATERIAL TO
THE CONSIDERATION OF THE POINTS
TO BE RELIED UPON ON APPEAL.

Come now the above-named appellants and designate the following documents as the record material to consideration of the points to be relied upon on appeal, the pages being the page numbers in the record of the District Court in this case:

Documents	Pages (each inclusive)
Bill of Complaint.....	2-7
Motion to Dismiss the Second Count of Plaintiff's Complaint for Lack of Juris- diction	9-18
Minute Order Entered November 1, 1948.....	20
Plaintiffs' Motion to Strike Part of Com- plaint	21
Answer and Counterclaim of Defendants Rayford Camp & Co. and Rayford Camp..	23-31
Notice Under 35 U.S.C. 69.....	33-34
Defendants' Interrogatories Under Rule 33..	36-41
Plaintiffs' Interrogatories Under Rule 33....	43-44
Stipulation of February 11, 1949.....	46
Amended Reply of Plaintiffs William J. Dubil and Edward J. Hubik to Counter- claims of Defendants	47-49

Plaintiffs' Answers to Certain of Defendants' Interrogatories	50-52
Answer to Amended Complaint and Counterclaim of Defendants Rayford Camp & Co. and Rayford Camp	62-71
Plaintiffs' Answers to Defendants' Interrogatories V(a), VII, VIII, IX, X, and XVI	77-79
Stipulation of March 4, 1949	85
Amended Complaint	86-92
Stipulation of March 11, 1949	94
Stipulation of March 16, 1949.....	95-96
Order Re Inspection of Plants.....	97-99
Defendants' Answers to Plaintiffs' Interrogatories	100-101
Defendants' Objections to Plaintiffs' Interrogatories to William A. Sloan.....	103-104
Minute Order Entered March 28, 1949.....	109A
Minute Order Entered March 29, 1949.....	109B
Minute Order Entered March 30, 1949.....	109C
Minute Order Entered March 31, 1949.....	109D
Minute Order Entered April 1, 1949.....	109E
Minute Order Entered April 4, 1949.....	110
Minute Order Entered April 5, 1949....	111A-111B
Minute Order Entered April 6, 1949.....	111C

Minute Order Entered April 7, 1949.....	111D-111E
Opinion	112-117
Donald C. Russell Affidavit Re Prior Decisions of this Court.....	139-144
Donald C. Russell Affidavit Re Prior Proceedings in this Case.....	145-148
Donald C. Russell Affidavit Re Harris, Kiech, Foster & Harris Brief on Attorneys' Fees	149-158
Findings of Fact and Conclusions of Law..	159-173
Judgment	175-176
Affidavit of C. G. Stratton.....	178-179
Order Re Supersedeas Bond.....	181-182
Notice of Appeal.....	184
Designation of Contents of Record on Appeal	186
Stipulation to Extend Time to File Record on Appeal and to Docket the Appeal, and Order Granting Extension.....	188-189
Docket Entries	190-195
Certificate of Clerk of District Court....	Last Page

Exhibits

Plaintiffs' Exhibits 1, 16, 27, 28, 29, and 30, and Defendants' Exhibits S, T, and U.

Dated at Los Angeles, California, this 15th day of November, 1949.

/s/ C. G. STRATTON,
Attorney for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 19, 1949.

[Title of Court of Appeals and Cause.]

COUNTERDESIGNATION BY APPELLEES
OF ADDITIONAL PARTS OF RECORD

Appellees hereby designate additional parts of the record which they think are material for the consideration of the appeal herein:

Documents

Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss the Second Count of Plaintiffs' Complaint for Lack of Jurisdiction.

Plaintiffs' Points and Authorities re Defendants' Motion to Dismiss the Second Count.

Plaintiffs' Objections to Defendants' Interrogatories dated February 17, 1949.

Notice of Taking Deposition upon Written Interrogatories dated February 17, 1949.

Defendants' Cross Interrogatories to William H. Sloan dated February 25, 1949.

Motion to Inspect dated March 10, 1949.

Motion to Strike dated March 10, 1949.

Petition for an Order to Show Cause Why the Defendant Rayford Camp Should Not Be Held in Contempt of Court and Punished Accordingly.

Petition by the Plaintiffs.

Memorandum of Defendants' with Respect to Plaintiffs' Affidavits, Petition, and Objections to Proposed Findings of Fact and Conclusions of Law dated July 26, 1949.

Petition to Fix Amount of Supersedeas Bond dated August 15, 1949.

Petition to Stay Execution on Judgment dated August 16, 1949.

Statement of Points to Be Relied upon on Appeal dated November 10, 1949.

Dated: At Los Angeles, California, this 23rd day of November, 1949.

HARRIS, KIECH, FOSTER
HARRIS,
FORD HARRIS, JR.,
WARREN L. KERN,

By /s/ FORD HARRIS, JR.,
Attorneys for Appellees.

Receipt of copy acknowledged.

[Endorsed]: Filed November 25, 1949.

No. 12403

United States
Court of Appeals
for the Ninth Circuit.

WILLIAM J. DUBIL, EDWARD J. HUBIK and
EARL F. SHORES,

Appellants,

VS.

RAYFORD CAMP & CO., and RAYFORD CAMP,
Appellees.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

FEB 13 1950

PAUL P. O'BRIEN, ~
CLERK

No. 12403

United States
Court of Appeals
for the Ninth Circuit.

WILLIAM J. DUBIL, EDWARD J. HUBIK and
EARL F. SHORES,

Appellants,

vs.

RAYFORD CAMP & CO., and RAYFORD CAMP,
Appellees.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 8649-Y

WILLIAM J. DUBIL, EDWARD J. HUBIK,
and EARL F. SHORES,

Plaintiffs,

vs.

RAYFORD CAMP & CO., RAYFORD CAMP,
JOHN DOE, JANE DOE, and JOHN DOE
CO.,

Defendants.

MEMORANDUM OF POINTS AND AUTHOR-
ITIES IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS THE SECOND
COUNT OF PLAINTIFFS' COMPLAINT
FOR LACK OF JURISDICTION

This is an action alleging, in the first count of the Complaint, infringement of plaintiffs' patent on Method of Preparing Fresh Meat and, in the second count, infringement of the trade-mark "Chip Steaks" and unfair competition.

This motion is addressed to the second count which is characterized in the pleading as a "Second, Further and Additional Cause of Action." It is defendants' contention that this Court lacks jurisdiction over the cause or causes of action set forth therein and that the second count of plaintiffs' Complaint should, accordingly, be dismissed.

Plaintiffs' Complaint does not allege diversity of citizenship nor registration of its trade-mark under any federal trade-mark statute but, in Paragraph VIII, asserts only a California State registration which is insufficient to confer original jurisdiction in an infringement action in the federal court. The basis of this Court's jurisdiction is stated, however, in Paragraph V of the Complaint, to arise under the patent laws of the United States. It is apparent, therefore, that there is no original jurisdiction over the matter pleaded in the second count but that plaintiffs rely on the jurisdiction of the Court over their first cause of action in patent infringement to provide the necessary jurisdiction over the second cause of action for infringement of their California trade-mark and unfair competition. But, as will be shown, such derivative jurisdiction of the federal court over the second cause of action is also lacking in this instance, and thus there is nothing whatever to sustain this cause of action in the federal court.

I.

In the Absence of Diversity of Citizenship, the Federal Court Lacks Jurisdiction over a Non-Federal Cause of Action Joined with a Separate and Distinct Federal Cause of Action.

Plaintiffs' first cause of action for patent infringement is a federal cause of action properly cognizable by the federal court. Joined therewith, their second cause of action, being non-federal in character, is governed, as to the jurisdiction of the

federal court to hear it, by the rule enunciated by the Supreme Court in *Hurn v. Oursler*, 289 U. S. 238, 77 L. Ed. 1148 (1933), and reiterated in *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, 83 L. Ed. 195 (1938).

In the *Hurn Case* the plaintiff alleged that he was the author of the copyrighted play "The Spider" which was infringed by defendant's play entitled "The Evil Hour". Plaintiff had previously submitted "The Spider" to defendant who had rejected it. The complaint alleged (1) copyright infringement, (2) unfair competition with the copyrighted play "The Spider", and (3) unfair competition with an uncopyrighted version of "The Spider".

The Supreme Court held that the lower court had direct jurisdiction over claim (1) and derivative jurisdiction over claim (2) but no jurisdiction over the unfair competition cause alleged in claim (3). The fundamental basis of the distinction was clearly made that federal claim (1) and non-federal claim (2) showed but one cause of action for which dual remedies were alleged, whereas claim (3) alleged a separate and distinct cause of action from the federal claim for copyright infringement. Said Mr. Justice Sutherland at page 1154:

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a

single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.” (Underscoring indicates italics.)

And in referring to claim (3) above, the court stated at page 1155:

“ . . . Since that claim did not rest upon any federal ground and was wholly independent of the claim of copyright infringement, the district court was clearly right in dismissing it for want of jurisdiction. The bill as amended, although badly drawn, sets forth facts alleged to be in violation of two distinct rights, namely, the right to the protection of the copyrighted play, and the right to the protection of the uncopyrighted play. From these averments two separate and distinct causes of action resulted, one arising under a law of the United States, and the other arising under general law. For reasons that have already been made manifest, the latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case. It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the com-

plaint with another which is within its jurisdiction.”

It is submitted that the present cause of action for infringement of the California trade-mark and unfair competition is similar to the claim which was dismissed in *Hurn v. Oursler*, *supra*, for lack of jurisdiction.

II.

Plaintiffs' Allegations of Unfair Competition and Trade-Mark Infringement Set Forth a Separate and Completely Distinct Cause of Action From the Cause of Action for Patent Infringement over which this Court has Jurisdiction.

In following the rule stated by the Supreme Court in *Hurn v. Oursler supra*, it is only necessary for the Court to determine whether the two counts of plaintiffs' Complaint state two separate causes of action or but one cause of action having several remedies. In other words, is the second count here similar to the unfair competition with the copyrighted play in *Hurn v. Oursler*, or is it like the situation where unfair competition is alleged with respect to the uncopyrighted version?

Some light on this question is shed by the Court's own definition of what constitutes a cause of action for jurisdictional purposes. This is stated as follows at page 1154:

“... ‘A cause of action does not consist of facts ... but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be

considered severally or in combination, is the violation of but one right by a single legal wrong. . . .’ ”

In the present case the second count of plaintiffs’ Complaint definitely states a separate and distinct cause of action from that alleged in the count for patent infringement. Not only is the second count characterized by plaintiffs in their own pleading as “a second, further and additional cause of action,” but, applying the test definition stated by the Supreme Court above, it becomes clear that the second count of the Complaint seeks to protect a different right and to redress for a different wrong than the first count.

Plaintiffs’ first cause of action alleges the infringement of a process patent, the claims of which cover only a method of preparation. There are no product claims to this patent, thus it is infringed only by following the steps in preparing the meat disclosed and claimed by the patentee. The patent, like any process patent, is not infringed by the sale of the product produced by the process.

See:

Merrill v. Yoemans,

94 U. S. 568, 24 L. Ed. 235 (1877) ;

Welsbach Light Co. v. Union Incandescent
Light Co., 101 Fed. 131 (C.C.A. 2 1900) ;

National Phonograph Co. v. Lambert Co.,
125 Fed. 388 (C.C. Ill. 1903) ; .

Barton v. Nevada Consolidated Copper Co.,
36 Fed. (2d) 85 (D.C. N.Y. 1929) ;

In re Amtorg Trading Corp.,
75 Fed. (2d) 826 (C.C. P.A. 1935); and
Foster v. Snell,
88 Fed. (2d) 611 (C.C.A. 2 1937).

In the last cited case the rule is stated at page 612 as follows:

“ . . . A mere sale of the product of the process does not constitute an infringement of a process patent. Welsbach Light Co. v. Union Incandescent Light Co., 101 F. 131 (C.C.A. 2); In re Amtorg Trading Corporation, 75 F. (2d) 826, 832 (Cust. & Pat. App.), and cases therein cited.”

Thus, in the first count plaintiffs' only complaint under the patent in suit is that defendants have manufactured or prepared meat by a process which plaintiffs alone may practice. It is the invasion of plaintiffs' exclusive right to engage in the patented method which is the sole right capable of being violated thereunder. In the second count an entirely different right is alleged to be invaded, namely, the right to exclusive use of the trade-mark and freedom from unfair competition in the sale of the meat product. The sale of the meat by defendants gives rise to one cause of action under the second count; the manufacture or preparation of the meat gives rise to another cause of action under the first count. Two different acts on defendants' part are required, namely, manufacture of meat by the patented process and sale of meat unfairly, or bearing an infringing label. Two separate acts; two separate rights invaded; two separate causes of action resulting.

Since the *Hurn v. Oursler* decision, many lower courts have applied a practical test to determine whether in any case separate causes of action or but a single cause was involved. If the facts requiring proof at the trial under both counts were found to be nearly identical, then as a matter of convenience it would appear desirable to hold that but a single cause of action was involved and to try both issues in one suit in the federal court. However, where no substantial overlapping of facts would result at the trial, jurisdiction has been consistently refused under *Hurn v. Oursler* as exemplified in the following cases:

Musher Foundation v. Alba Trading Co.,
127 Fed. (2d) 9, 10 (C.C.A. 2 1942) (Cert.
denied 317 U. S. 641 87 L. Ed. 517, 1942);

Lewis v. Vendome Bags,
108 Fed. (2d) 16 (C.C.A. 2 1939) (Cert.
denied 309 U. S. 660 84 L. Ed. 1008, 1940);

Zalkind v. Scheinman,
139 Fed. (2d) 895 (C.C.A. 2 1943) (Cert.
denied 322 U. S. 738 88 L. Ed. 1572, 1944);

*Hydraulic Press Mfg. Co. v. Columbus Iron
Malleable Co.*, 35 F. Supp. 603 (D.C. Ohio
1940);

Keyes Fibre Co. v. Chaplin Corp.,
76 Fed. Supp. 981, 985 (D.C. Me. 1947);

Fred Benioff Co. v. Benioff,
55 Fed. Supp. 393, 396 (D.C. N.D. Cal.
1944); and

Bell v. Hood,
71 Fed. Supp. 813, 820 (D.C. S.D. Cal.
1946).

In the present case little convenience would be served by joining plaintiffs' various causes of action in one suit. The patent infringement count involves questions concerning the validity of the patent, such as prior art, anticipation, and invention, as well as the question of infringement by use of the claimed method of meat preparation. The trade-mark and unfair competition actions involve the validity and infringement of the trade-mark, the sale of the meat, its dress, and particularly confusion among customers. There is no substantial overlapping of facts to be proven under each separate cause of action. Thus, there is no persuasive reason for extending jurisdiction even as a practical matter to the unrelated non-federal claim.

In *Musher Foundation v. Alba Trading Co.* *supra*, the situation was very similar to the present case. There the complaint alleged in the first count infringement of three product and process patents and in the second count infringement of the plaintiff's common law trade-mark "Infused" and unfair competition by defendant's use of this word in advertising and on its containers for the sale of the products. No diversity of citizenship existed, and defendant moved to dismiss the second cause of action for lack of jurisdiction. The court, upholding the dismissal by the district court, with Judge Clark dissenting, said at page 10:

"In the case before us we can see no substantial identity between the proof showing infringement of the complainant's patents and that showing an infringement of its common law trade-mark "In-

fusion.” Proof of infringement of the patents would require no evidence of the use of the word “infusion” and proof of the similarity of complainant’s and defendant’s containers would not establish infringement of the patents. The two counts do not merely allege different grounds of recovery founded upon substantially the same facts, but rather set forth causes of action which under the doctrine of *Hurn v. Oursler* and *Armstrong Paint & Varnish Works. v. Nu-Enamel Corp.*, *supra*, are separate and cannot be joined, since one is federal and the other non-federal. Consequently, the district judge properly dismissed the second cause of action for lack of jurisdiction.”

The Supreme Court denied certiorari in this case in 317 U. S. 641, 87 L. Ed. 517.

It is to be noted that, even under Judge Clark’s excellent dissent in the *Musher Case*, jurisdiction is lacking here since separate causes of action having not even “a substantial amount of overlapping testimony” are pleaded in the Complaint.

In conclusion, under the definition of a cause of action stated in *Hurn v. Oursler* *supra* and according to the lower court cases following and interpreting this decision, each count of plaintiffs’ Complaint states a separate and distinct cause of action. Since only the first of these is federal in character, it is submitted that this Court has no jurisdiction over the “Second, Further and Additional Cause of Action” alleged in plaintiffs’ Complaint, and it should, accordingly, be dismissed.

[Endorsed]: Filed October 21, 1948.

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK and EARL F.
SHORES,

Appellants,

VS.

RAYFORD CAMP & Co. and RAYFORD CAMP,

Appellees.

APPELLANTS' BRIEF.

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MAR 6 1950

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TOPICAL INDEX

	PAGE
Background	1
Points appealed upon.....	2
I.	
Abuse in this case?.....	4
Lower court juggled figures.....	5
No foundation for attorneys' fees.....	5
"Several pretrial hearings".....	7
"Numerous depositions"	7
"Plant inspections"	7
Nine days of trial.....	8
Bad precedent	10
Attorneys on both sides appear to agree.....	12
No special circumstances.....	13
No attorney fees for trade-mark and unfair competition mat- ters	19
What are "reasonable" attorneys' fees?.....	20
Costs included	21
Out of line with established precedent.....	22
Discretion must have basis.....	23
II.	
Court had no jurisdiction of trade-mark and unfair competition matters	24
No jurisdiction of trade-mark and unfair competition.....	26
New Federal Judicial Code.....	27
Breach of confidence is non-federal.....	31
Conclusion re attorneys' fees.....	34

TABLE OF AUTHORITIES CITED

CASES	PAGE
Activated Sludge v. Sanitary District of Chicago, 64 Fed. Supp. 25; aff'd 157 F. 2d 517; cert. den. 330 U. S. 834, 91 L. Ed. 1281, 67 S. Ct. 970.....	20
Aeration Processes, Inc. v. Walter Kidde & Co., Inc., 83 U. S. P. Q. 403.....	9
Blanc v. Spartan Tool Co., 168 F. 2d 296.....	18
Bowles v. Quon, 154 F. 2d 72.....	23
Couch Pats. Co. v. Berman, 137 App. Div. 297, 121 N. Y. Supp. 978	32
Dixie Cup Company v. Paper Container Mfg. Company, 169 F. 2d 645	8
Dixie Cup Company v. Paper Container Mfg. Company, 174 F. 2d 834	9
Faulkner v. Gibbs, 170 F. 2d 34.....	23
French Renovating Co. v. Ray Renovating Co., 170 F. 2d 945	31, 32
Gate-Way v. Hillgren, 82 Fed. Supp. 546.....	32
Gold Dust Corp. v. Hoffenberg, 87 F. 2d 451.....	19
Hall v. Keller, 81 Fed. Supp. 835.....	4, 23
Hurn v. Oursler, 289 U. S. 238, 77 L. Ed. 1148.....	27, 28, 29, 33
Juniper Mills, Inc. v. J. W. Landenberger & Co., 76 U. S. P. Q. 300.....	18
Lincoln Electric Co. v. Linde Air Products Co., 74 Fed. Supp. 293	16
Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235.....	25
Musher Foundation v. Alba Trading Co., 127 F. 2d 9.....	29, 33
National Brass Co. v. Michigan Hardware Co., 75 Fed. Supp. 140	14

PAGE

Riedly v. Hudson Motor Car Co., 82 Fed. Supp. 8.....	32
Snell, Foster D., v. Potters, et al., 88 F. 2d 611.....	26
Union Nat. Bank of Youngstown v. Superior Steel Corp., 9 F. R. D. 117.....	17
Welsbach Light Co. v. Union Incandescent Light Co., 101 Fed. 131	25

MISCELLANEOUS

Senate Report 1503 (79th Cong., 2d Sess.).....	13
--	----

STATUTES

Judicial Code (new), Sec. 1338(b).....	27, 33
Judicial Code, Sec. 1920.....	34
Judicial Code, Sec. 1924.....	34
Rules of Civil Procedure, Rule 12(h)(2).....	29
United States Code Annotated, Title 35, Sec. 70....	10, 17, 19, 22, 23

No. 12403

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK and EARL F.
SHORES,

Appellants,

vs.

RAYFORD CAMP & Co. and RAYFORD CAMP,

Appellees.

APPELLANTS' BRIEF.

Background.

This action was filed below for patent infringement, state trade-mark infringement, and unfair competition. The Lower Court did not make any Findings nor enter any Judgment with respect to patent infringement, but held the patent in suit invalid. That part of the decision of the Lower Court which relates to the validity of the patent is not appealed from.

The Honorable Charles C. Cavanah, retired United States District Judge from Idaho, sat in the trial of this case. The proceedings prior to and subsequent to the trial of this case were heard by the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, Central Division.

Points Appealed Upon.

This appeal is taken only upon two points:

1. That the award of \$15,000.00 for attorneys' fees and costs in this case should be reversed, or at least vastly reduced; and
2. That the Lower Court lacked jurisdiction to try the issues of state trade-mark infringement and unfair competition between citizens of the same state.

The Specification of Errors relied upon in this appeal is as follows:

I.

That the Lower Court erred in holding that it had jurisdiction to try and in trying the second, further and additional cause of action set forth in the Complaint in this case.

II.

The Lower Court erred in not granting the defendants' "Motion to Dismiss the Second Count of Plaintiffs' Complaint for Lack of Jurisdiction."

III.

The Lower Court erred in assessing any attorneys' fees whatever in this case.

IV.

The Lower Court erred in paragraph XXXII of the Findings in finding that defendants' attorneys have been required to attend numerous contested motions prior to trial, or that any pre-trial was conducted in this case, and erred in finding that "numerous" depositions and plant inspections requiring their attendance were conducted, and

erred in finding that this action by plaintiffs was unjustifiably filed or prosecuted or was unreasonably prolonged.

V.

The Lower Court erred in paragraph XXXII of the Findings in finding that either Twenty Thousand Dollars (\$20,000.00) or Twelve Thousand Dollars (\$12,000.00) (the Court was apparently undecided as to which sum he wanted to assess) is a reasonable sum for attorneys' fees and costs in this action; that the Lower Court abused its discretion in such finding without any showing whatever as to what a reasonable attorneys' fee would be in this case; and the Lower Court erred in not having the actual costs taxed, as is the practice in the Lower Court, instead of lumping them together with the attorneys' fees without any proof whatever as to what the actual costs were.

VI.

The Lower Court erred in paragraph XV of the Findings in finding that the art pleaded in the present case was not before the Court in *Dubil v. Landau and Levy*, No. 247-B; erred in not finding that the subject matter of two of the four prior patents relied upon here were before the Court in *Dubil v. Landau and Levy*; and erred in not holding that the Court previously held the patent in suit valid in a contested case in its decree against Levy in said case.

VII.

The Lower Court erred in paragraph XIV of the Conclusions, in concluding that the defendant Camp is entitled to recover attorneys' fees and costs in the amount of Fifteen Thousand Dollars (\$15,000.00), or any other amount,

or that Fifteen Thousand Dollars (\$15,000.00) is a reasonable amount for such.

VIII.

The Lower Court erred in paragraph VII of the Judgment, in adjudging that the defendant shall recover attorneys' fees and costs in the sum of Fifteen Thousand Dollars (\$15,000.00), or any other amount. [Tr. pp. 195-7.]

I.

Abuse in This Case?

It is submitted that there has been an abuse of discretion by the Lower Court in this case, in assessing \$15,000 for attorneys' fees and costs!

There are no special circumstances in this case that justify such an award. In fact, the patent in suit [Tr. p. 181] was previously sued upon in the same Lower Court, and, after a trial before a Special Master whose decision was approved by the United States District Court for the Southern District of California, Central Division, the patent here in suit, in such previous case, was declared to be "good and valid in law" [Tr. pp. 166-180].

Therefore, it is submitted that there was "justifiable cause for filing [and] prosecuting this action," since the patent in suit was previously held valid.

As held in *Hall v. Keller*, 81 Fed. Supp. 835, 836 (D. C. La., 1949), where there is "probable cause for the suit," attorneys' fees should be denied.

Since there appeared to be probable cause in the present case, it appears unfair to penalize the present appellants, when they sued upon a patent judicially held to be valid by another Judge sitting in the same Court.

Lower Court Juggled Figures.

It seems clear that Judge Cavanah was not sure what he wanted to assess as attorneys' fees in this case. At first, in his Opinion, he stated that the defendants should recover \$20,000 for attorneys' fees and costs [Tr. p. 106]!

Then Judge Cavanah signed the Findings of Fact and Conclusions of Law in a somewhat confused state. The Findings still say, in the typewritten part, that \$20,000 is "a reasonable sum" for the defendants to receive as attorneys' fees and costs. However, above the \$20,000 is written "\$12,000" [Tr. p. 143, last line]. Judge Cavanah was the only one with authority to interline the \$12,000, and these figures appeared on the Findings when they were returned signed by him [Tr. pp. 149-150].

Since the Conclusions and Judgment assessed \$15,000 for attorneys' fees [Tr. pp. 146 and 148], it appears that Judge Cavanah vacillated among \$20,000, \$12,000 and \$15,000, due to his uncertainty (which is believed to show clearly the lack of any *factual* foundation for any award of attorneys' fees. There should not have been a variation of as much as \$8000 if any proper basis had been laid for assessing attorneys' fees).

No Foundation for Attorneys' Fees.

It is submitted that there is no basis in this case for the unreasonable and unjustifiable attorneys' fees of \$15,000 (or \$20,000 or \$12,000). Paragraph XXXII, which is the only attempt in the Findings of Fact or Conclusions of Law to bolster up the excessive attorneys' fees, is very loosely drawn. That paragraph states that the defendants' attorneys were required to attend in Court on "numerous" separately contested motions prior to the trial [Tr. p.

143]. That is not borne out by the record, unless four times be considered "numerous." The record shows that prior to the trial the defendants' counsel were in Court in this case only on the following four occasions:

1. To argue the defendants' Motion to Dismiss the Second Count of Plaintiffs' Complaint. This motion was denied; the hearing took less than one hour [Tr. pp. 8, 9 and 115-116].
2. On plaintiffs' objections to certain of defendants' 28 interrogatories [Tr. pp. 41 *et seq.*]. The plaintiffs answered 7 interrogatories without objection and objected to 21. Of these 21, the Court held that the plaintiffs did not have to answer $15\frac{2}{3}$ of them and ordered the plaintiffs to answer $5\frac{1}{3}$ of them. This hearing took less than one hour, and, as seen, was considerably more against the defendants than the plaintiffs [Tr. pp. 45-7, 60-2 and 116].
3. On plaintiffs' Motion to Inspect Defendants' Plant [Tr. pp. 77-9]. This motion was granted and it took not more than one (1) hour in Court for the hearing [Tr. pp. 79-82 and 116].
4. On plaintiffs' Motion to Strike paragraph "M" of the Answer to the Amended Complaint [Tr. p. 72]. This hearing likewise took not more than one (1) hour [Tr. p. 116.]

Thus the "numerous" (4) hearings before the trial took less than four hours altogether.

“Several Pretrial Hearings.”

In addition to the above, the Findings of Fact state that defendants' counsel also attended “several pretrial hearings” prior to the trial of this case [Tr. p. 143]. This is entirely in error. No pretrial hearings whatever were held in this case [Tr. p. 114]! The record is absolutely devoid of such; in fact, none was conducted by either of the two Judges who sat at different times in the case [Tr. pp. 158-165]. It is not seen how there can be any dispute but that the Lower Court was entirely in error on this point, which is one of the bases for assessing \$15,000 as attorneys' fees in this case.

“Numerous Depositions.”

The Finding that there were “numerous depositions” is a vague conclusion of the author thereof [Tr. p. 143]. The fact is that there were 9 depositions. However, there were 3 depositions of the defendant Camp and 2 depositions of the plaintiff Shores, so actually the depositions of only six (6) different people were taken, and one of those depositions was taken on interrogatories, at which no counsel was present [Tr. pp. 92 and 115]. All nine (9) depositions took only approximately 8 hours altogether [Tr. p. 115].

“Plant Inspections.”

“Plant inspections” were also mentioned in the Findings [Tr. p. 143] as being a basis for part of the out-sized attorneys' fee. The plant inspections were two. One took one-half day and the other took less than one hour [Tr. pp. 114-5].

Nine Days of Trial.

The less than 4 hours in Court on motions prior to the trial; the 8 oral depositions and the written one, that took no more than 8 hours altogether; the two plant inspections, which respectively took one-half day and less than one hour; the 9 days of trial; and preparation for the motions and trial, is the work of defendants' counsel for which the Lower Court assessed the sum of \$15,000 in attorneys' fees!

This oppressively large attorneys' fee was awarded despite the facts that: (1) The patent in suit is less than a page and half long [Tr. p. 181], so obviously was not very involved; (2) the testimony offered on behalf of the defendants in this case took less than 2½ days to present; and (3) the final arguments on both sides plus the arguments on both sides on defendants' Motion to Dismiss at the conclusion of plaintiffs' testimony, took less than one day [Tr. pp. 90-8]. The other 5½ days were engaged in putting on plaintiffs' case on patent infringement, trademark infringement and unfair competition, which is not believed to be "prolonging" the trial.

As stated in *Dixie Cup Company v. Paper Container Mfg. Company*, 169 F. 2d 645, 651 (C. C. A. 7):

" . . . Whether either party is entitled to an award of attorney fees under the circumstances of the case, we express no opinion. If the court, however, sees fit to make such allowance, we think the proper exercise of its discretion requires that the amount allowed bear some reasonable relation to the services rendered. . . ."

The Seventh Circuit recently again considered this attorney's fee section very carefully in *Dixie Cup Co. v. Paper Container Mfg. Co.*, 174 F. 2d 834 (C. C. A. 7, June 1949), stating:

“Judicial discretion . . . requires that the court be discreet, just, circumspect and impartial, and that it exercise cautious judgment. The term connotes the opposite of caprice and arbitrary action.” (p. 836)

That paragraph alone is believed to show the fallacy of the enormous attorneys' fee in this case, since it is believed that the award of \$15,000.00 for attorneys' fees is neither “discreet, just, circumspect [or] impartial,” or is the result of “cautious judgment.” That Court continued:

“We believe that to justify a finding of abuse of discretion it is necessary to show that the order complained of was based upon an erroneous conception of the law or *was due to the caprice of the presiding judge or to an action on his part arbitrary in character.*” (p. 837.) (Italics added.)

Applying that to the present case, it is believed that a \$15,000.00 attorneys' fee, not being based upon the facts in this case, is the result of the caprice of the trial judge. It is also believed that his indecision as to whether to assess the sum of \$20,000.00, \$12,000.00 or \$15,000.00 shows his action was arbitrary and without proper foundation in fact.

Moreover, the proof upon which attorneys' fees are based must be *adequate*. See *Aeration Processes, Inc., v. Walter Kidde & Co., Inc.*, 83 U. S. P. Q. 403 (C. C. A. 2,

Nov. 1949). As a corollary to this, the Finding of Fact relative to an attorneys' fee must be *adequate*.

It is believed that \$15,000 as attorneys' fees is not only unreasonable, capricious and unjustifiable, but there is a hint in the Findings that the Lower Court assessed at least part of this sum, if not all of it, as a punitive measure against the plaintiffs, since paragraph XXXII states that the plaintiffs "unreasonably prolonged" the trial [Tr. p. 143]. It is submitted to this Honorable Court that attorneys' fees should not be assessed against a losing party as punishment, but only as compensation in case the action was unjustifiable or brought under special circumstances such as bad faith, frivolous suit, harassment, oppression, etc. The statute (35 U. S. C. A., §70) permits only "reasonable" attorneys' fees which, it is submitted, should be by way of reimbursement in those cases where it would be a gross injustice not to award attorneys' fees.

Bad Precedent.

It is believed that it would be an extremely dangerous precedent and would be a serious deterrent to industrial and commercial advancement and development in our country if the Courts should allow extremely large and penalizing attorneys' fees against patentees who in good faith seek the determination of what they honestly believe to be infringements of their patents, and especially where the validity of the patent had been generally acquiesced in for years, following a judicial holding that the patent is valid, as in this case.

A potential award of attorneys' fees that would bankrupt the ordinary patentee would, in most cases, prevent the ordinary inventor from asserting his legal rights ac-

corded him by his patent, for fear of being forced to bear the burden of an extreme penalty in the form of what to him would be an enormous attorneys' fee, in the event of his failure to prevail in the case. If such becomes the law of this Circuit, it would seem that patent litigation would become a "rich man's privilege."

It is respectfully submitted that attorneys' fees should be allowed only in aggravated cases, similar to the practice of the courts in exercising their discretionary powers to treble damages in a patent case where the infringement of a defendant is found to be wilful and deliberate. Even despite this power, it very rarely happens that treble damages are awarded, even in extreme cases.

If back-breaking attorneys' fees are awarded in patent cases, the appearance of an infringer would leave a patentee to an election of one of two alternatives: (1) to permit the infringement to continue with the resulting detriment to his business, which naturally tends to decrease and/or eliminate all profit; or, (2) to assert his rights based upon his patent in a court of law, with a possible heavy penalty if the patent which he thought was valid (because it was issued to him by the United States Patent Office) is finally held to be invalid.

It is submitted that, apart from the rights of the parties to this litigation, this Judgment, if allowed to stand, would be a very bad precedent. Defendants in patent cases are very frequently corporations (as this Honorable Court knows), and often large corporations. On the other hand, inventors are often relatively poor individuals. Therefore, this case, if not reversed as to the attorneys' fees, could very well (and already has, although that is not in the record) discourage individuals from asserting their

rights against infringers for fear of being assessed excessive attorneys' fees if they should not prevail.

Large corporations will sue upon patents and flagrantly infringe them, despite tremendous attorneys' fees (and the higher the tax bracket, the less the corporation would be discouraged, because the Government would pay most of it). Whereas, on the other hand, a poor, struggling inventor does not dare risk not only losing his patent, but also face the hardship of having to pay attorneys' fees in oppressive proportions. It is thought that the entire effect of the Judgment of the Lower Court in this case is wrong. It tends to discourage Yankee ingenuity—not encourage it.

Attorneys on Both Sides Appear to Agree.

The attorneys for both the appellants and the appellees appear to agree that attorneys' fees should not be allowed except under special circumstances. This lawsuit presents the very rare situation of having briefs written by counsel on *both* sides agreeing on the same point. The following quotations are from the brief of Harris, Kiech, Foster and Harris, Esqs., counsel for the appellees here, which was filed in another case before the present suit was commenced:

(a) "It was not the purpose of the amended Statute, 35 U. S. C. A. §70, to award attorneys fees to the prevailing defendant in a patent infringement suit except under special circumstances resulting in a gross injustice."

(b) "The award of attorneys' fees to the prevailing party in a patent infringement suit in the absence of special circumstances is contrary to well-established precedents."

(c) "It is an abuse of the Trial Court's discretion to award attorney's fees to a prevailing defendant sued for infringement of Letters Patent unless there is some evidence of special circumstances justifying such award."

Said entire brief appears at pages 117-125 of the Transcript in this case. Since it was a brief *amicus curiae* (and not as employed counsel), and since it was done at the expense of appellees' counsel, it is believed that it can be assumed that that brief expresses the personal views of appellees' counsel as to what the law is generally, and what it should be in this Circuit.

Without repeating here the entire brief that appears at pages 117-125 of the Transcript, it is incorporated herein, and it is respectfully asked that this Honorable Court read said brief as being a good and careful consideration of the law in this connection.

No Special Circumstances.

From the foregoing, it is submitted that there are no special circumstances in this case which would call for the assessing of attorneys' fees, and no special circumstances were relied upon by the Lower Court in its Opinion, Findings, Conclusions or Judgment.

Attorneys' fees in patent cases were not intended to be the ordinary thing. The provision was made general merely to prevent gross injustice. See the Senate Report 1503 of the 79th Congress, Second Session:

"By the second amendment, the provision relating to attorney's fees is made discretionary with the court. *It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but*

the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be royalty. The provision is also made general so as to enable the court *to prevent gross injustice to an alleged infringer.*" (Italics added.)

The above quotation is given in many of the cases on attorneys' fees, including the *amicus curiae* brief of Harris, Kiech, Foster and Harris, Esqs., appellees' counsel [Tr. pp. 118-9]. Apparently, the importance of the above Senate Report is not denied.

It is urged that the present case is an ordinary patent infringement case with no gross injustice to the appellees-defendants.

The following statement by Harris, Kiech, Foster and Harris, appellees' counsel, in their said brief *amicus curiae* would appear particularly apt:

"It is apparent that a Trial Court in awarding attorneys' fees in the absence of special circumstances, fails to construe the new amendment in accordance with its express purpose and intent and fails to look to the history of the amendment, the judicial interpretation of analogous statutes, and the decisions of other Courts in determining principles and proper guidance." [Tr. pp. 124-5.]

Also showing that special circumstances are necessary before an award of attorneys' fees should be made in favor of a prevailing defendant, see the case of *National Brass Co. v. Michigan Hardware Co.*, 75 Fed. Supp. 140 (D. C. Mich. 1948), cited and quoted from in the brief *amicus*

curiae of appellees' counsel [Tr. p. 124]. That Court stated:

"In construing the amendment relating to the award of attorney's fees in patent cases, the court may well consider the judicial construction placed upon a substantially similar statute relating to attorney's fees in copyright cases. . . .

"A comparison of these two statutes clearly shows that while the language is not identical, they are similar in effect and legal import. . . .

"Examination of the cases arising under the copyright statute indicates that in some instances attorney's fees have been awarded and in other instances have been denied. However, from a reading of these cases one may extract the general principle that attorney's fees are awarded only where dictated by equity and good conscience. . . . They should not be awarded unless equity considerations exist which call for the penalization of the losing party.

"The defendant in the present case cites certain decisions in support of its motion for allowance of attorney's fees. An examination of these cases will show that for the most part they involved an award of attorney's fees to plaintiffs in suits in which the defendants were found guilty of infringement (see *Cory v. Physical Culture Hotel, Inc.*, 2 Cir., 88 F. 2d 411; *Sheldon v. Moredall Realty Corporation*, D. C., 29 F. Supp. 729) or involved suits in which the court found that the actions were 'filed without justification, either in law or in fact' (see *Corcoran v. Montgomery Ward & Co., Inc.*, D. C., 32 F. Supp. 421, 422) or in which the plaintiff's claim of infringement was 'quite fantastic' (see *Rose v. Connelly*, D. C., 38 F. Supp. 54, 55).

“A careful review of the pleadings, testimony, and circumstances in the present case clearly indicates that it was the usual and ordinary suit for infringement of patent and that it was instituted in good faith and vigorously prosecuted. The court finds no evidence indicating bad faith or dilatory, harassing or vexatious tactics on the part of the plaintiff. There appear to be no special circumstances and no equitable considerations which would justify an award of attorney’s fees to the defendant. . . .”

The present case also is the usual and ordinary suit for infringement of patent and was instituted in good faith and vigorously prosecuted. There was no Finding of bad faith or dilatory, harassing or vexatious tactics by the plaintiffs here.

A leading case along this line is *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D. Ohio, 1947). This case was cited and quoted from in the Harris, Kiech, Foster and Harris said brief *amicus curiae* [Tr. pp. 123-4]. The *Lincoln Electric* case is very persuasive authority in favor of appellants. Note the following from that case:

“This cause came on for hearing on the motion of the defendant for an allowance of attorney’s fees, a proposed order and judgment, and the objections thereto. The request for attorney’s fees is based on a recent enactment of Congress, 35 U. S. C. A. §70. The statute was passed after the present action had been instituted, but it would be applicable to the present case if the circumstances warranted the allowance requested. It is apparent from the wording of the statute and its history that an award of attorney’s fees should not be made in an ordinary case. The court is invested with discretionary power where it is

necessary to prevent gross injustice. The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances of gross injustice. . . . This court does not consider that the action by the plaintiff was absolutely unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the conditions indicated in the statute must be made to entitle the applicant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorney's fees to the prevailing party. The motion is therefore overruled."

In *Union Nat. Bank of Youngstown v. Superior Steel Corp.*, 9 F. R. D. 117, 121 (D. C., W. D. Pa., 1949), the Court stated with reference to the attorney's fee provision of 35 U. S. C. A. §70:

"With reference to this power, however, the Congressional history of the amendment indicates that it was to be used *sparingly*." Citing the Senate Report No. 1503, *supra*, to the effect that it was contemplated that attorney's fees would not become "'an ordinary thing in patent suits'" and that it was made general "'to prevent a *gross injustice*.'" (Italics added.)

Since the patents in that case were held valid, the Pennsylvania Court, *supra*, held (p. 121):

". . . it would be difficult indeed to assert that plaintiff was not justified in bringing defendant into court."

In the instant case, it is submitted that the plaintiffs were "justified" in bringing the defendants into court since the patent in suit was previously held valid by the same Court.

Another strong case *re* not allowing attorneys' fees in the ordinary, normal patent case is *Juniper Mills, Inc. v. J. W. Landenberger & Co.*, 76 U. S. P. Q. 300 (D. C. Pa., 1948), in which the Court said:

"It has never been supposed that counsel fees are normally allowable to a successful party as part of the costs. In most, if not all, cases where statutory authority has been given to the court to allow them, the intention has been to make the allowance something in the nature of a penalty for some sort of unfair, oppressive or fraudulent conduct on the part of the losing party. I think this was the reason why the 1946 amendment made the award discretionary with the court and I believe the court should not award an attorney's fee as costs in an ordinary normal patent case."

Since the present case is an ordinary, normal one, with no finding of gross injustice and with nothing unfair, oppressive or fraudulent, the phenomenally large attorneys' fee is believed to show a clear abuse of the Lower Court's discretion. Under such circumstances, this Court has the right to reverse the Lower Court's decision as to attorneys' fees. See *Blanc v. Spartan Tool Co.*, 168 F. 2d 296, 300 (C. C. A. 7).

No Attorney Fees for Trade-Mark and Unfair Competition Matters.

A substantial part of the trial of this case was occupied with trade-mark and unfair competition issues. 35 U. S. C. A. §70 states in part that, "The court may in its discretion award reasonable attorneys' fees to the prevailing party upon the entry of judgment in any *patent* case." (Italics added.) Attorneys' fees are not allowed for trade-mark infringement or unfair competition matters. See *Gold Dust Corp. v. Hoffenberg*, 87 F. 2d 451 (C. C. A. 2). However, no effort was made by the Lower Court in its Findings in this case, to separate the patent portion of this case from the remainder of it, for assessing attorneys' fees. This alone is believed to be reversible error. Assessing attorneys' fees in patent cases is of course in derogation of the common law, so should be strictly construed. (Appellees' counsel agree with this [Tr. p. 121]), and no attorneys' fees should be levied for any part of a trial involving trade-mark and unfair competition matters.

Although it is not believed to be a safe criterion because of the widely different fees that are charged by different attorneys for the same identical type of work (*e. g.*, the plaintiffs here should not be charged here for the *three* attorneys who sat at the defendants' table throughout most of the trial [see Tr. pp. 84-98]), neither the Findings, the Conclusions or the Judgment was in any way based upon what the defendants were actually charged for or had actually paid for attorneys' fees. The Lower Court Judge simply picked three figures out of the air (\$20,000, \$12,000 and \$15,000) and finally settled upon one of them. It is submitted that such guesswork should not be the proper basis for levying attorneys' fees. In *Activated Sludge v. Sanitary District of Chicago*, 64 Fed.

Supp. 25, 36 (affirmed 157 F. 2d 517, cert. den. 330 U. S. 834, 91 L. Ed. 1281, 67 S. Ct. 970), the Court refused to consider "the amount of fees of counsel."

What Are "Reasonable" Attorneys' Fees?

The appellants' very first point is that there should not be any award of attorneys' fees in this case whatever, since there are no special circumstances here. This suit is not believed to be a frivolous one, since it is based upon a patent that the same Lower Court had already declared good and valid in law. Moreover, this suit was not believed to have been brought because of any gross injustice—no such basis appears in the Lower Court's Findings, Conclusions or Judgment in this case.

The appellants' second point is that even if attorneys' fees are assessed, the sum of \$15,000 is entirely out of line. One rule of thumb is to assess \$100 per day for court work and \$100 per day for a corresponding amount of office work and preliminary matters. For instance, for a nine-day trial, if it were a case involving special circumstances, and if approximately one-half the time was spent on patent matters, the fee would be \$450 for the four and one-half ($4\frac{1}{2}$) days of court work on the patent part only of the case, and \$450 for the preliminary matters and preparation for the patent part of the trial, or a total of \$900 for $4\frac{1}{2}$ days of trial and $4\frac{1}{2}$ days of preparation devoted to patent matters (exclusive of trade-mark and unfair competition matters). That rule of thumb would seem to be more in line with what would be a "reasonable" attorney fee—which is the only attorney fee permitted by the Statute. The Statute does not permit a Lower Court Judge to assess an unreasonable attorney fee as a punitive measure for "prolonging" a trial.

The sum of \$15,000.00 is over \$1600.00 per day for every day in Court. Even considering the normal preliminary motions in this case, and normal preparation for trial, this is a very excessive amount of attorneys' fees.

It is submitted that the award of attorneys' fees should be reversed on the ground that the Findings do not show special circumstances warranting any attorneys' fees in this case, or at the very least, send the case back to the Lower Court to determine what a *reasonable* attorneys' fee would be, in view of the fact that only part of the case was on patent infringement or patent validity, and in view of the fact that costs were included.

Costs Included.

It will be noted that the Lower Court assessed the \$15,000 (originally \$20,000) for both "costs and attorneys' fees" [Tr. p. 146]. However, no cost bill was ever filed by the defendants [Tr. pp. 158-165]. A bill of costs must be filed and the costs taxed in the proper manner, in accordance with Section 1920 of the Judicial Code.

Moreover, a bill of costs must be verified that it is "correct and has been necessarily incurred in the case." No such affidavit has ever been filed in this case, as required by Section 1924 of the Judicial Code.

It is submitted that this commingling of attorneys' fees and court costs by the Lower Court, without any bill of costs, verified or unverified, ever having been filed, is alone sufficient basis for reversing the fixing of \$15,000 for attorneys' fees and costs in this case, since it is obviously very irregular and not at all in keeping with the practice in this Circuit or the Statute under which the Lower Court obtained its right to assess costs.

Out of Line With Established Precedent.

The assessing of such an excessive attorneys' fee as \$15,000 is out of line with the custom and established precedent in the District Court of the Southern District of California, Central Division. This Honorable Court can, of course, take judicial notice of the precedents which have come up from that Division of the District Court. No other case in the history of that Division has ever approached such an out-sized attorneys' fee.

A careful analysis of the prior decisions of that Court was made in an endeavor to get all the patent cases that had been decided in the District Court of the Southern District of California, Central Division, after August 1, 1946 (when 35 U. S. C. A. §70, relating to awarding reasonable attorney fees, went into effect). Nineteen such cases were found. In eleven of them no attorneys' fees whatever were entered, which is more than half of them.

In four of the patent cases by that District, \$500 was awarded as attorneys' fees. It was in one of the \$500 cases (*Helbrush, et al. v. Finkle*) in which the appellees' counsel here, Harris, Kiech, Foster and Harris, Esqs., filed their brief *amicus curiae*, objecting to \$500 as an attorney fee! In the other four cases, the attorneys' fees awarded ran from \$800 to \$3300 [Tr. pp. 109-114].

It is submitted: An attorneys' fee assessed by an out-of-the-state Judge, which is almost five (5) times as great as the highest ever levied by any of the seven resident Judges of the Southern District of California, who rendered nineteen decisions in patent cases from August 1, 1946 to the filing of this appeal, is entirely out of line with the ESTABLISHED LOCAL CUSTOM.

In awarding attorneys' fees, "the Trial Court must act in conformity with established precedent," stated Harris, Kiech, Foster and Harris, appellees' counsel, in their said

brief *amicus curiae*, citing *Bowles v. Quon*, 154 F. 2d 72, 73 (C. C. A. 9, 1946) [Tr. p. 118].

In *Faulkner v. Gibbs*, 170 F. 2d 34 (C. C. A. 9, 1948), attorneys' fees of \$500 were affirmed by this Honorable Court as being a reasonable amount.

Since counsel on both sides seem to agree that attorneys' fees must conform to established precedent, and clearly \$15,000 does not conform to established precedent in the District Court whence this case came, it is submitted that on that ground alone, the award of attorneys' fees should be reversed.

Discretion Must Have Basis.

Although 35 U. S. C. A. §70 permits the Court "in its discretion" to award attorneys' fees, that does not mean the Lower Court can pick a figure out of the air with no basis whatever. It does not mean that the Lower Court can employ guesswork. It does not mean that the Lower Court can assess unreasonable attorneys' fees. The discretion must have a basis. See *Hall v. Keller, supra*, in which the Court stated that reasons must be given for the Court's discretion when attorneys' fees are awarded, in the following words:

"For one party litigant to be cast for the attorney's fees of the other party litigant is not of the ordinary. Generally there is a statute; the provision is either mandatory or discretionary.

"In the instant case *it is discretionary. Therefore, the court should and must give reasons.*" (Italics added.)

It is urged that adequate reasons have not been given in this case to show special circumstances requiring the award of attorneys' fees. This is an ordinary patent infringement case where no gross injustice is involved.

II.

**Court Had No Jurisdiction of Trade-Mark
and Unfair Competition Matters.**

The second and last point in this brief is that the Lower Court had no jurisdiction of the infringement of the state-registered trade-mark or the unfair competition matter in this case. The fact that the Lower Court had jurisdiction of the patent matter is admitted and is not appealed from. However, the patent in suit is merely a method or process patent [Tr. p. 181] and it would be infringed only by carrying out the method or process; that is, by freezing and thawing fresh meat in the manner described in the patent and then slicing it into very thin slices. That is all. The sale of such thin slices of fresh meat would *not* be an infringement upon the patent in suit. Therefore, the sale of the thin sliced fresh meat under the state-registered trade-mark or in unfair competition would not be related to, or be part of, the same transaction as the carrying out of the method or process, since no sale whatever is involved in infringement of the method or process patent.

The attorneys in this case have substantially reversed their positions on this point. The undersigned urged the jurisdiction below, and the appellees' counsel argued that the Lower Court did not have jurisdiction of the state-registered trade-mark or unfair competition matter because the patent in suit is a method or process patent. As to the second count in the Complaint, relating to the state trade-mark and unfair competition matter, counsel on the other side stated below:

“In the second count an entirely different right is alleged to be invaded, namely, the right to exclusive

use of the trade-mark and freedom from unfair competition in the sale of the meat product. The sale of the meat by defendants gives rise to one cause of action under the second count; the manufacture or preparation of the meat gives rise to another cause of action under the first count. Two different acts on defendants' part are required, namely, manufacture of meat by the patented process, and sale of meat unfairly or bearing an infringing label. Two separate acts; two separate rights invaded; two separate causes of action resulting." [Tr. p. 209.]

It has long been held that a method or process patent is not infringed by the sale of an article made by the process. See *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235:

" . . . If, however, appellant's patent is only for the mode of treating these oils invented and described by him, in other words, for his new process of making this new article of hydrocarbon oil, then it is clear the defendants have not infringed the patent, because they never used that process or any other, for they manufactured none of the oils which they bought and sold."

See also *Welsbach Light Co. v. Union Incandescent Light Co.*, 101 Fed. 131 (C. C. A. 2), in which the Court said:

"If it was a patent for a process, it would not be infringed by selling the product."

The Second Circuit recently again affirmed this old and well known rule in *Foster D. Snell v. Potters, et al.*, 88 F.

2d 611 (C. C. A. 2, 1937), wherein the Court said (p. 612):

“A mere sale of the product of the process does not constitute an infringement of a process patent.”

All the above cases, and three others, were cited to the same effect by the counsel for the appellees [Tr. pp. 208-9]. It cannot be successfully disputed but that that is the law today.

If the sale of an article made by a patented process is not an infringement of the patent, then it is submitted the sale of that article under any particular trade-mark, and especially a state-registered trade-mark, or any unfair competition connected solely with the sale of the article, would not be part of the same transaction or be related to the Federal question of patent infringement, and, therefore, the second count should have been dismissed by the Lower Court as not cognizable in a Federal Court.

No Jurisdiction of Trade-Mark and Unfair Competition.

State Registered Trade-Mark. It should be borne in mind that the trade-mark involved in this case is not a Federally registered mark, but is solely based upon a state-registered trade-mark, to wit, a California registration of the mark “Chip Steak.”

No Diversity of Citizenship. There is no diversity of citizenship in this case and no allegation that the amount in controversy amounts to \$3,000, exclusive of interest and costs.

New Federal Judicial Code.

The new Federal Judicial Code, Section 1338 (b), states that a claim of unfair competition can be joined with a "substantial and related" claim under the Copyright, Patent or Trade-Mark Laws. Due to the present controversy being between citizens of the same State, the present state-registered trade-mark and unfair competition matters would have to be "related" to the patent infringement in order for the Lower Court to have original jurisdiction thereof. However, since the sale of the product of a patented process is not an infringement of that patent, such sale is a step away from the patent infringement. Certainly questions connected with the state-registered trade-mark under which such product is sold, or unfair competition in connection with such sales, would be a second step away from the patent infringement. Therefore, it is submitted that questions connected with infringement of a state-registered trade-mark and unfair competition between citizens of the same State are not "related" to infringement of a process or method patent, but are two steps removed from it.

The reviser's notes of the Judicial Code are to the effect that Section 1338 (b) enacts into statutory authority, *Hurn v. Oursler*, 289 U. S. 238, 77 L. Ed. 1148 (1933), the leading case along this line. Referring to Section 1338 (b), the reviser stated:

" . . . While this is the rule under Federal decisions, this section did enact it as statutory authority. The problem is discussed at length in *Hurn v. Oursler* (1933, 53 S. Ct. 586, 289 U. S. 238, 77 L. Ed. 1148) and in *Musher Foundation v. Alba Trading Co.* (C. C. A. 1942, 127 F. 2d 9) (majority and dissenting opinions)."

Since *Hurn v. Oursler, supra*, is clearly the law, some study of that case seems in order. There were different causes of action alleged in the complaint in that case. One was for infringement of a copyrighted play and unfair competition directly connected therewith. The second cause of action was for uncopyrighted additions thereto and unfair competition with respect to such uncopyrighted parts. The Supreme Court held that "two separate and distinct causes of action resulted, one arising under a law of the United States and the other arising under general law" (p. 248). In announcing a rule to be followed in these two types of cases, the Court stated (pp. 245-6):

"But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*." (Italics in original.)

In the present case, since the sale of the product of a patented process is not an infringement upon a patent on the process, infringement of the state-registered trademark and unfair competition between citizens of the same State are "separate and distinct non-federal" matters.

They are not distinct grounds in support of the same cause of action, but are entirely separate and distinct causes of action.

In conclusion, the Supreme Court said (p. 248):

“ . . . It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within the jurisdiction.”

As also stated on the same page by the Supreme Court, a matter that is “entirely outside the Federal Jurisdiction” is “subject to dismissal at any stage of the case.” Moreover, as stated in Rule 12(h)(2) of the Rules of Civil Procedure, “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Thus the present attack on the jurisdiction of the Lower Court in this case (which has in fact been continuous throughout this case) is believed well taken at this point.

In *Musher Foundation v. Alba Trading Co.*, (C. C. A. 2) 127 F. 2d 9, 10, the majority of the Court held that to a cause of action for infringement of patents on the process of infusing oil and on the products, a plaintiff could not join a second cause of action alleging unfair competition as to the use of the word “Infused” in the sale of said oil.

Circuit Judge Augustus N. Hand delivered the majority opinion in the *Musher* case. He interpreted the *Hurn v. Oursler* case to mean that a non-federal claim might be joined with a federal claim, “if the non-federal count differed from the federal count only because it asserted a

different ground of recovery upon substantially the same state of facts" (p. 10). The Second Circuit majority held that there was no "substantial identity" of the two counts in that case since:

"Proof of infringement of the patents would require no evidence of the use of the word 'infusion' and proof of the similarity of complainant's and defendant's containers would not establish infringement of the patents. The two counts do not merely allege different grounds of recovery founded upon substantially the same facts, but rather set forth causes of action which under the doctrine of *Hurn v. Oursler* and *Armstrong Paint and Varnish Works vs. Nu-Enamel Corp.*, are separate and cannot be joined, since one is federal and the other non-federal."

Certainly in the instant case, proof of infringement of the process or method patent had nothing whatever to do with sale of the product of the patented process, and still less to do with the name of "Camp Steak" [Tr. pp. 185 and 187] under which the defendants sold their steaks. Conversely, evidence of the similarity of the two labels of the parties hereto would not in any way prove appropriation by the defendants of the process or method covered in the patent in suit. They are an entirely different state of facts and entirely different causes of action.

The Supplemental Transcript of Record in this case (a separate volume of pages 203-212) is completely made up of the appellee's Points and Authorities in favor of dismissing the second count of the Complaint. Without repeating same at this point, reference is made to it and it is incorporated herein.

Breach of Confidence Is Non-Federal.

Paragraph X of the Amended Complaint [Tr. pp. 69-70] alleges a breach of confidence by the defendant Camp. The allegations are that Camp had been a salesman for the plaintiff Shores, that the route was owned by the plaintiff Shores, that the list of customers was the property of the same plaintiff, but that after his said employment terminated, the said defendant wrongly solicited the customers included in said list and had induced such customers to buy defendant's steaks instead of the plaintiff Shores'.

Under the doctrine of *French Renovating Co. v. Ray Renovating Co.*, (C. C. A. 6, 1948) 170 F. 2d 945, the above allegations would be non-federal and not joinable with a federal matter. That case, like this, had no diversity of citizenship. The plaintiff there alleged patent and copyright infringement, both of which were admittedly federal matters. Then the plaintiff in that case alleged "breach of contract and breach of trust." The breach of trust alleged was that the defendant had agreed not to divulge certain formulae and/or processes but had violated that covenant. That Court said (p. 947):

"The District Court . . . as an original proposition it has no jurisdiction over suits for breach of contract or breach of trust where there is, as here, a lack of diversity of citizenship and of an allegation that the value of the relief sought is in excess of \$3000.00, exclusive of interest and costs. Title 28 U. S. C. A. Ch. 2, Sec. 41, par. (1). Such suits are non-federal in their nature and the District Court does not acquire jurisdiction over them merely because they are joined in the complaint with other causes of action which are within its jurisdiction. *Hurn v. Oursler*, 289 U. S. 238, 248, 53 S. Ct. 586, 77 L. Ed. 1148.

“Before the District Court in such a case may accept jurisdiction of such non-federal causes of action, it must appear that both federal and non-federal causes rest upon substantially identical facts. *Hurn v. Oursler*, *supra*, 289 U. S. at page 246, 53 S. Ct. at pages 589, 590, 77 L. Ed. 1148. It is the duty of plaintiff, as always, to establish jurisdiction and we cannot say that it has successfully carried this burden. Plaintiff’s non-federal claims are entirely independent of its federal claims and it does not appear with any appreciable degree of certainty that the facts necessary to support them would also support the federal claims.”

Riedly v. Hudson Motor Car Co., 82 Fed. Supp. 8, 12 (D. C. Ky. 1949), quotes a substantial part of the above quotation from the *French Renovating* case, and holds that a cause of action based upon implied contract may not be included in a federal case any more than a contract or breach of trust matter.

The late Judge O’Connor of the District Court, Southern District of California, held to a similar effect in *Gate-Way v. Hillgren*, 82 Fed. Supp. 546 (1949). That case was brought upon an alleged breach of an assignment of a patent, the patent being brought in collaterally. Judge O’Connor with approval quoted the following from *Couch Pats. Co. v. Berman*, 137 App. Div. 297, 121 N. Y. Supp. 978:

“‘One cannot join a cause of action involving federal jurisdiction, with one in which the court has no jurisdiction in the absence of diversity of citizenship.’” (Citing four cases and a text.)

“ ‘ . . . A suit of which the court would have jurisdiction because of the nature of the cause of action cannot be used as the means to bring into the equitable jurisdiction of this court a cause of action between the parties over which the court could not have jurisdiction unless diversity of citizenship of the parties gave the United States Courts generally jurisdiction over the case.’ *Vose v. Roebuch Weather Strip Co.*, D. C., 210 F. 687, 688.

“ ‘We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff’s letters patent, and seeks relief on that ground, presents a case arising under the patent laws of which the district court should have taken jurisdiction.

“ ‘But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices embodying the inventions of the plaintiff’s patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws.’ ”

Thus, in accordance with *Hurn v. Oursler*, *supra*, Section 1338 (b) of the new Federal Judicial Code, Circuit Justice Augustus Hand in the *Musher* case, *supra*, the Sixth Circuit in the *French Renovating* case, *supra*, and the late Judge O’Connor, the Lower Court should have granted the Motion to Dismiss the Second Count of Plaintiffs’ Complaint for Lack of Jurisdiction.

Conclusion re Attorneys' Fees.*

(a) The attorneys on both sides agree that attorneys' fees should not be assessed in a patent case unless there are special circumstances, *e. g.*, bad faith, harassment, oppression, a frivolous suit, or the like. It is submitted that there are no special circumstances in this case, since the patent here sued upon was previously held good and valid in law in a litigated case, by this very Lower Court. Thus there was just cause for believing that the patent was valid as to the present appellees also. Therefore, it is believed that there was "justifiable cause for filing [and] prosecuting this action," and that no attorneys' fee whatever should have been levied in this case.

(b) The Lower Court was in error in saying that there were "several pretrial hearings," since no pretrial whatever was held in this case. Moreover, the "numerous" contested motions (four matters, to be exact) were mostly decided in favor of the appellants and not the appellees. The "numerous depositions" took eight hours or less. The "plant inspections" took one-half day for one and one hour for the other. These, together with the nine days of trial, it is submitted, do not lay a foundation for attorneys' fees of the magnitude of \$15,000, even if reasonable attorneys' fees were awarded.

(c) The award of \$15,000 being for both costs and attorneys' fees, should be set aside, since it is not shown how much was for costs. If any part of the \$15,000 is for costs, it should be reversed on that ground alone, since no verified bill of costs was filed, as required by Sections 1920 and 1924 of the Judicial Code.

*The next preceding matter states the Conclusion *re* the jurisdiction of the second count of the Complaint.

(d) Since the attorneys' fee Statute is in derogation of the common law, it should be strictly construed as applying to patent matters only, and not be applied to the trademark and unfair competition parts of this case, since attorneys' fees have never been allowed in such cases.

(e) The sum of \$15,000, awarded by the out-of-state Judge who tried this case, is entirely out of line in a District where the resident judges in the *majority* of cases, assessed no attorneys' fees whatever; in half of those cases where attorneys' fees were assessed, the local judges have levied only \$500 (and even that was objected to by appellees' counsel, in their said brief *amicus curiae*); and the largest attorneys' fees assessed in the District from which this case comes, only amounted to \$800 to \$3300. Therefore, the present case is clearly out of line with local custom.

(f) The Statute says that assessing any attorneys' fees at all lies within the "discretion" of the judge. This not only means sound discretion, and that it must be "reasonable," but there must be proper basis for any attorneys' fee of the proportions of \$15,000!

(g) It is believed that on the first ground appealed upon (oppressiveness and unreasonableness of the attorneys' fee), this Honorable Court should (i) reverse the matter of attorneys' fees on the ground that no special circumstances are shown in this case, and so no attorneys' fees should be assessed; or, in any event, (ii) send this case back to the Lower Court to determine what a *reasonable* attorneys' fee would be, in the spirit of equitable fairness to the appellants as well as to the appellees, and not use the attorneys' fee statute as punishment for allegedly "prolonging" the trial.

The appellants in this case are unable to bear the burden of paying the attorneys' fees awarded in this case without disastrous or near disastrous results. The three appellants in this action are typical of ordinary patentees and ordinary licensee. Dubil has been a small town builder with a modest income. Hubik is a butcher in his own small meat market. Those two are the patentees. Shores operates his own meat business as an individual. He is the licensee. All three were acting in good faith and relied upon the patent in suit and upon the recognition by others of its validity, over a number of years, following the previous holding by the Lower Court that this patent was valid.

It is believed that the appellants have shown their good faith in this case so that in an humble spirit they approach this Honorable Court with the respectful plea that they should not be punished for their honest opinion by being assessed what is to them an enormous and oppressive amount of attorneys' fees.

Respectfully yours,

WILLIAM J. DUBIL,
EDWARD J. HUBIK and
EARL F. SHORES,

By C. G. STRATTON.

Attorney for Appellants.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK and EARL F.
SHORES,

Appellants,

vs.

RAYFORD CAMP & Co., and RAYFORD CAMP,

Appellees.

BRIEF OF AMICI CURIAE.

COLLINS MASON,
MASON & GRAHAM,
PHILIP SUBKOW,
FULWIDER & MATTINGLY,
HAZARD & MILLER,

C. LAUREN MALTBY,

JOHN FLAM,

ALAN FRANKLIN,

WM. R. LITZENBERG,

R. S. BERRY,

All of Los Angeles, California,

Amici Curiae.

TOPICAL INDEX

	PAGE
(a) The reasons for the filing of this brief.....	1
(b) The framers of our Constitution never intended that a patentee should be penalized when, in good faith, he asks a court to interpret and enforce his patent.....	3
(c) Congress never intended that the amendment to the statute should result in penalizing patent litigants who act in good faith	4
(d) Award of attorney's fees generally is contrary to public policy	4
(e) Further precedent for the contention urged here is found in the court's interpretation of the attorney's fees provision of the copyright statute.....	6
(f) Courts in other circuits generally follow the intent of Congress in construing the 1946 amendment.....	6
(g) The authors of this brief makes no contention as to the propriety of the award of attorney's fees in this particular case	8
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Blanc v. Spartan Tool Co., 83 U. S. P. Q. 533.....	8
Buck v. Bilkie, 65 F. 2d 447.....	6
Hall v. Keller, et al., 81 Fed. Supp. 835.....	8
Juniper Mills, Inc. v. J. W. Landenberger & Co., 76 U. S. P. Q. 300.....	7
Lincoln Electric Co. v. Linde Air Products Co., 74 Fed. Supp. 293, 75 U. S. P. Q. 267.....	7, 8
National Brass Co. v. Michigan Hardware Co., 76 U. S. P. Q. 186	6
Oelrichs v. Williams, 82 U. S. 211, 21 L. Ed. 43.....	4
Shaw v. Merchants National Bank, 101 U. S. 575, 25 L. Ed. 892	5

MISCELLANEOUS

Senate Report No. 1503, June 14, 1946.....	4, 6
--	------

STATUTES

United States Code Annotated, Title 17, Sec. 40.....	6
United States Code Annotated, Title 35, Sec. 70.....	1, 2

No. 12403

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK and EARL F.
SHORES,

Appellants,

vs.

RAYFORD CAMP & Co., and RAYFORD CAMP,

Appellees.

BRIEF OF AMICI CURIAE.

(a) The Reasons for the Filing of This Brief.

In 1946, Congress amended the patent statute, 35 USCA 70, to provide that:

“ . . . The Court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.”

While in many cases in this District, attorney's fees have not been allowed, except as against a party who litigated in bad faith, some of the District Judges have made it a practice to award attorney's fees *as a general thing*, even though the losing party acted in good faith in prosecuting or defending the action.

This last-mentioned practice poses the threat of barring the Courts to any but wealthy patent litigants. To suffer an adverse judgment for an opponent's attorneys' fees is a penalty which is of little moment to a wealthy litigant. But all patent litigants are not wealthy. To many, such a judgment means the difference between bankruptcy and continued solvency, and we should not have a situation in which such a litigant cannot, in good faith, take his patent controversy to Court without risking ruin if he loses the case. Typical of such litigants is the small manufacturer struggling to build a business around a limited patent protection which the Government has granted him. The law should be construed uniformly, however. It should be construed to give the Courts the discretionary power to penalize a patent litigant, whether he be rich or poor, if he is guilty of bad faith; *but, in the absence of a clear showing of bad faith, he should not be penalized for taking his case to Court.*

It is submitted that the award of attorney's fees against a losing plaintiff or defendant, like the increase of damages allowed by 35 U. S. C. A. Sec. 70, is a penalty, and that the safeguards which the Courts have set up to prevent unjust increases in damage awards should also surround the award of attorney's fees. There are, of course, many cases in which an award of attorney's fees is quite proper. For instance, there is the case in which the plaintiff-patentee clearly brings the suit for harassment or as a tool of unfair competition; and there is the case of the defendant who deliberately copies his competitor's patented

article without sound reason; or the case in which, *because of the further 1946 amendment restricting recoveries to general damages*, the defendant deliberately infringes because he feels that he will only be held liable for such damages and may not be held liable for his profits.

On the other hand, there is the case in which a plaintiff-patentee has ample reason to believe his patent to be valid and infringed; and there is the case in which the defendant innocently engaged in the act charged to infringe, or had good reason to believe he did not infringe. Such a litigant should not be penalized.

(b) The Framers of Our Constitution Never Intended That a Patentee Should Be Penalized When, in Good Faith, He Asks a Court to Interpret and Enforce His Patent.

The purpose of the constitutional foundation for our patent statute was to encourage invention, not to discourage it. The learned judges and the skilled Patent Office examiners often disagree as to whether the patented subject-matter involves invention or ordinary mechanical skill. When the Patent Office grants a patent, it is, according to the statute, presumptively valid. That should be ample assurance for the patentee, *in good faith*, to submit the patent to the Courts without fear of penalty if the Courts disagree with the Patent Office. Any other interpretation of the amended patent statute is bound, in time, to discourage invention.

(c) Congress Never Intended That the Amendment to the Statute Should Result in Penalizing Patent Litigants Who Act in Good Faith.

This is made clear by the Committee Reports of Congress. For instance, Senate Report No. 1503, June 14, 1946, adopted from a report of the House Committee on Patents, reads as follows:

“By the second amendment the provision relating to attorney’s fees is made discretionary with the court. It is not contemplated that the recovery of attorney’s fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.”

(d) Award of Attorney’s Fees Generally Is Contrary to Public Policy.

In discussing award of attorney’s fees in patent cases, prior to the 1946 amendment, the Supreme Court said, in *Oelrichs v. Williams*, 82 U. S. 211, 21 L. Ed. 43:

“. . . It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. *Teese v. Huntingdon*, 23 How. 2 (64 U. S., XVI, 479); *Whittemore v. Cutter*, 1 Gall. 429; *Stimpson v. The Railroads*, 1 Wall., Jr., 164 . . .” (p. 45).

“ . . . In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

‘We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.’ (p. 45.)”

Therefore, the Courts should be careful to confine award of attorney’s fees to those cases in which the losing litigant is shown to be guilty of bad faith. Any other interpretation of the 1946 amendment is contrary to sound public policy.

Shaw v. Merchants National Bank, 101 U. S. 575,
25 L. Ed. 892.

(e) Further Precedent for the Contention Urged Here Is Found in the Court's Interpretation of the Attorney's Fees Provision of the Copyright Statute.

The Copyright Statute, 17 U. S. C. A. 40, contains a similar provision. Attorney's fees are often awarded in copyright infringement cases, because "copying" is an essential element of infringement, and the probability that "copying" is inadvertent or innocent is very small. However, an examination of the copyright decisions shows that, where there are extenuating circumstances which disclose a lack of bad faith on the part of the infringer or on the part of the plaintiff copyright owner, the Courts generally have refused an award of attorney's fees.

Buck v. Bilkie, 65 F. 2d 447 (9th Cir.).

(f) Courts in Other Circuits Generally Follow the Intent of Congress in Construing the 1946 Amendment.

A careful review of the decisions in other Circuits shows that those Courts have generally construed the 1946 amendment in accordance with the intent of Congress as set forth in Senate Report No. 1503 quoted hereinabove.

After reviewing extensively the judicial interpretation of the provision permitting attorneys' fees in copyright cases and reasoning from such construction to interpret the new patent provision, the Court in *National Brass Co. v. Michigan Hardware Co.*, 76 U. S. P. Q. 186 (D. C., W. D. Mich. 1948), concluded:

"A careful review of the pleadings, testimony, and circumstances in the present case clearly indicates that it was the usual and ordinary suit for infringement of patent and that it was instituted in good faith and

vigorously prosecuted. The court finds no evidence indicating bad faith or dilatory, harassing or vexatious tactics on the part of the plaintiff. There appear to be no special circumstances and no equitable considerations which would justify an award of attorneys' fees to the defendant" (p. 187).

In *Juniper Mills, Incorporated v. J. W. Landenberger & Co.*, 76 U. S. P. Q. 300 (D. C., E. D. Pa. 1948), Judge Kirkpatrick, on plaintiff's motion for an award of attorneys' fees, stated:

"It has never been supported that counsel fees are normally allowable to a successful party as part of the costs. In most, if not all, cases, where statutory authority has been given to the court to allow them, the intention has been to make the allowance something in the nature of a penalty for some sort of unfair, oppressive or fraudulent conduct on the part of the losing party. I think this was the reason why the 1946 amendment made the award discretionary with the court and I believe the court should not award an attorney's fee as costs in an ordinary normal patent case" (p. 300).

Similarly, in the case of *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D. Ohio, 1947) (75 U. S. P. Q. 267), the Court held that in an ordinary patent action an award to the prevailing defendant was not authorized by the statute:

" . . . It is apparent from the wording of the statute and its history that an award of attorneys' fees

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Appellees.

BRIEF OF APPELLEE.

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TOPICAL INDEX

	PAGE
A. Introduction	1
B. The issues	2
C. The District Court properly awarded appellee its attorneys' fees and costs.....	3
1. The patent in suit was obtained by appellants by fraud on the patent office.....	3
2. Appellants have repeatedly used their fraudulently obtained patent to harass the public.....	4
3. The action was brought without probable cause and the trial unreasonably prolonged.....	5
4. The attorneys' fees and costs were not excessive.....	7
D. Jurisdiction as to the unfair competition should be affirmed..	10
1. Appellants unjustifiably attempt to change their position on the jurisdiction issue.....	10
2. The jurisdiction question is not properly appealable....	11
3. No prejudice has resulted to appellants as a result of the District Court sustaining its own jurisdiction	12
4. The trial court had jurisdiction as to the unfair competition questions	13
E. Conclusion	15

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Blanc v. Sparton Tool Co., 168 F. 2d 296.....	8
Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927.....	13
Cochran v. M. & M. Transp. Co., 110 F. 2d 519.....	12
Drilling & Exploration Corp. v. Webster, 69 F. 2d 416.....	9
First National Bank of Decatur v. Home Savings Bank, 88 U. S. 294, 22 L. Ed. 560.....	13
Foster & Kleiser Co. v. Special Site Sign Co., 85 F. 2d 742.....	11
Galloway v. General Motors Acceptance Corp., 106 F. 2d 466....	12
Guarantee Co. of North America v. Phenix Ins. Co. of Brook- lyn, 124 Fed. 170.....	12
Harding v. Federal Nat. Bank, 31 F. 2d 914.....	12
Houchlin Sales Co. v. Angert, 11 F. 2d 115.....	12
Juniper Mills, Inc. v. J. W. Landenberger & Co., 76 U. S. P. Q. 300	6
Lancaster v. Collins, 115 U. S. 222, 29 L. Ed. 373.....	13
Olsen v. Jacklowitz, 74 F. 2d 718.....	12
Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U. S. 806, 65 S. Ct. 993, 89 L. Ed. 1381.....	4
Sacramento Suburban Fruit Lands Co. v. Melin, 36 F. 2d 907....	11
Saulsbury Oil Co. v. Phillips Petroleum Co., 142 F. 2d 27.....	11
Sheldon v. Metro-Goldwyn Pictures Corp., 106 F. 2d 45.....	9
Strauss v. Victor Talking Machine Co., 297 Fed. 791.....	9
William H. Rankin Co. v. Associated Bill Posters, 42 F. 2d 152	9
Wilson Co. v. Third Nat. Bank, 103 U. S. 770, 26 L. Ed. 488....	13

STATUTES

United States Code, Title 28, Sec. 1338(b).....	13
United States Code, Title 28, Sec. 2111.....	13
United States Code, Title 35, Sec. 70.....	4

TEXTBOOKS

4 Corpus Juris Secundum, Sec. 183, pp. 359-361.....	12
---	----

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BRIEF OF APPELLEE.

A. Introduction.

This is the answer of appellee to "Appellants' Brief."

Appellants were plaintiffs in the District Court. Their complaint charged: (a) patent infringement [R. 3-4]; and (b) trade-mark infringement and unfair competition [R. 5-7].

The District Court held the patent invalid for numerous reasons [Findings VIII-XIV, R. 132-137], held that appellants' trade-mark in suit was invalid, and that appellee was not guilty of any unfair competition [Findings XIX-XXXI, R. 138-143], and dismissed the complaint [R. 148].

No appeal is taken by appellant from any of these fundamental rulings of the District Court going to the merits

of the case. Appellants, therefore, concede the propriety of the District Court's judgment on the issues presented to it by appellants and decided adversely to them.

Upon finding for appellee on every point, the District Court awarded to appellee attorneys' fee and costs, and it is as to this award that appellants' appeal is chiefly directed. Appellants also challenge the jurisdiction of the District Court to try the unfair competition issues proffered by the complaint, which were tried at appellants' insistence. Having failed in their charge of unfair competition after an extended trial, appellants after their notice of appeal [R. 155] for the first time question the jurisdiction of the District Court to try such issue.

In view of the outcome of the case on its merits in the trial court, and the tactics of appellants, we are confident that this Court will look with little favor on this appeal.

B. The Issues.

Only the following issues are raised by this appeal:

(a) Did the District Court abuse its discretion in awarding to appellee attorneys' fees and costs?

(b) Can appellants on this appeal properly reverse the position they took in the trial court and for the first time contend that there was no jurisdiction as to the unfair competition issues tried at their insistence?

(c) Is there any appealable question as to jurisdiction presented by this appeal?

(d) Did the District Court actually have jurisdiction over the unfair competition issues presented by appellants' complaint?

These issues are discussed briefly hereinafter.

Appellants' Brief discusses many matters not shown by the record on appeal, and matters which we believe are irrelevant to the issues raised or not deserving comment by us. Our refusal to burden the Court by laboring such matters should not be construed as an admission of any of appellant's assertions not specifically referred to herein.

C. The District Court Properly Awarded Appellee Its Attorneys' Fees and Costs.

1. The Patent in Suit Was Obtained by Appellants by Fraud on the Patent Office.

As its Conclusion of Law VII, the District Court concluded as follows:

“United States Letters Patent No. 2,052,221, in suit, and each of the claims thereof, is invalid and void for the reason that said patent was granted by the United States Patent Office upon material misrepresentations made to said Office to induce the issuance thereof.” [R. 145.]

The foregoing conclusion of law is fully supported by Finding of Fact XIV [R. 136-137], which clearly establishes that appellants Dubil and Hubik knowingly made false representations to the United States Patent Office to secure the issuance of the patent in suit. Finding of Fact XIV also establishes that appellants' present attorney was the instrument by which such misrepresentations were made to the Patent Office.

No appeal has been taken by appellants from Finding of Fact XIV or Conclusion of Law VII. This is an admission by appellants of the facts found. It is highly significant because it confirms the District Court's finding that appellants (at least, Dubil and Hubik, the patentees)

knew when this suit was filed that the patent sued upon had been obtained by fraud.

In view of such admitted fraud upon the Patent Office, we are surprised that appellants would attempt to argue to this Court that there were no unusual circumstances in this case justifying the award of attorneys' fees and costs. This case obviously never should have been filed or prosecuted, and appellants knew it. If deliberate fraud upon the Patent Office in the obtaining of a patent is not a circumstance justifying the award of an attorney's fee to a persecuted defendant, Section 70, Title 35, U. S. C. has no meaning.

Fraud in the procurement of a patent has always been especially condemned by the courts.

See:

Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U. S. 806, 65 S. Ct. 993, 89 L. Ed. 1381, at 1387 (1944).

Appellee submits that the award of attorneys' fees and costs should be affirmed alone upon the ground that fraud in obtaining the patent in suit constitutes a very unusual and reprehensible circumstance in this case fully justifying such award.

2. Appellants Have Repeatedly Used Their Fraudulently Obtained Patent to Harass the Public.

This is the latest of a number of suits filed by appellants against others charging infringement of the fraudulently obtained patent in suit.

The record shows a prior infringement suit by appellants Dubil and Hubik on this same void patent against Landau

and Levy, also in the Southern District of California [R. 166-180, 189-190]. In that case, a consent decree was taken against the defendant Landau [R. 171] and the Court held that the defendant Levy had not infringed the patent [R. 166].

Subsequent to the action against Landau and Levy, appellants Dubil and Hubik brought four other infringement actions on the fraudulently obtained patent in suit against miscellaneous defendants, all of which were dismissed, one being dismissed with prejudice, as is shown by the file-wrapper of the patent in suit, Defendant's Exhibit E in evidence.

This course of past conduct by appellants Dubil and Hubik against the public upon a patent which they knew was fraudulently obtained plainly shows their bad faith in prosecuting the present action. This is a further unusual circumstance in the present action. It is submitted that the award of attorneys' fees and costs to appellee should be affirmed upon this ground alone.

3. The Action Was Brought Without Probable Cause and the Trial Unreasonably Prolonged.

The District Court in its Finding of Fact XXXII found as follows:

“ . . . The plaintiffs did not have justifiable cause for filing or prosecuting this action, and trial of this action was unreasonably prolonged by plaintiffs.
 . . . ”

Since the appellants concede that the patent in suit was obtained by fraud, obviously the evidence fully supports this finding as to the lack of probable cause for filing or prosecuting this action. The fact that appellants have

taken no appeal on the merits of this action further confirms their lack of cause in filing or prosecuting it. Even if the appellants had any reason to believe that the patent in suit was valid, this would not avoid the award of attorneys' fees and costs to appellee, as any "unfair, oppressive or fraudulent conduct on the part of the losing party" may justify such an award, as stated in *Juniper Mills, Inc. v. J. W. Landenberger & Co.*, 76 U. S. P. Q. 300 (D. C. Pa. 1948).

As to the fact that the trial was unreasonably prolonged by appellants, the District Judge who sat at the trial and heard the appellants' presentation of the case would be the best judge of this. The record of the trial proceedings is not before the Court on this appeal and, accordingly, it is submitted that there is no evidence before this Court even tending to show that the District Court's finding is not correct. It is to be noted, however, that although prior to trial appellants' counsel represented on several different occasions and separately to District Judges McCormick and Yankwich that this case would take only two to three days to try in its entirety, appellants actually consumed six days of trial time in their presentation alone. Obviously, there were good grounds for finding that the trial had been unreasonably prolonged by appellants.

It is respectfully submitted that upon these grounds alone the award of attorneys' fees and costs should be affirmed.

4. The Attorneys' Fees and Costs Were Not Excessive.

The District Court's opinion initially awarded appellee the sum of \$20,000.00 as attorneys' fees and costs [R 106]. Appellants then made an extensive showing, objections, and argument (making substantially the same contentions which they now make to this Court) to the District Court to induce it to reduce the amount of the award [R. 106-125, 164]. As a result, the District Court by its Judgment awarded attorneys' fees and costs in the sum of only \$15,000.00 [R. 148], but in its Finding of Fact XXXII still found that \$20,000.00 would be a reasonable sum [R. 143]. Hence, the District Court reduced the amount actually awarded very substantially below what it found would be a reasonable sum.

Although only a small portion of the record and proceedings in this case is before this Court on this appeal, the record on appeal and particularly the docket entries [R. 158-165] indicate the very extensive and time-consuming proceedings had before the District Court and the extensive preparation required therefor of appellee's three counsel. Although not shown by the record, appellee actually incurred prior to this appeal attorneys' fees in excess of \$15,000.00 in the defense of this action, and in addition incurred expenses and costs in excess of \$2,500.00. Actually, the award to appellee is far less than this case cost him prior to this appeal. Furthermore, on this appeal appellee has incurred additional attorneys' fees to date of almost \$1,000.00. The attorneys' fees and costs awarded will not nearly compensate appellee for his defense of this baseless action brought upon a patent obtained by fraud. While it is appellee's position that the

award made by the District Court was within its sound discretion and should not be disturbed here, if this Court is to substitute its discretion for that of the District Court, the award should be increased to the \$20,000.00 which the District Court in its Finding XXXII [R. 143] found to be reasonable.

Since the District Court found that the attorneys' fees and costs awarded were reasonable, and since the evidence before this Court tends to establish this, and since there is no *evidence* to the contrary, and since the District Court's finding should not be overturned in the absence of clear and convincing evidence to the contrary, the award to appellee should not be disturbed.

Under the law, the award of attorneys' fees is discretionary with the trial court, and should not be disturbed in the absence of a clear abuse of discretion. The rule was stated by the Court of Appeals for the Seventh Circuit in *Blanc v. Sparton Tool Co.*, 168 F. 2d 296, as follows:

“Under 35 U. S. C. A. §70 the court may in its discretion award reasonable attorneys' fees to the prevailing party. But plaintiff argues that it was not contemplated that the recovery of attorneys' fees become ‘an ordinary thing in patent suits,’ and cites *Lincoln Electric Co. v. Linde Air Products Co.*, D. C., 74 F. Supp. 293, 294, in which the court denied fees because the case ‘presents a situation which is not unusual in patent matters’. We think it clear that under the statute the question is one of discretion. The court exercised its discretion and that ends the matter unless we can say as a matter of law that there was a clear abuse of discretion. This we cannot say.”

This Court in approving a substantial award said in *Drilling & Exploration Corp. v. Webster*, 69 F. 2d 416 (C. C. A. 9, 1934), at 418:

“The law is well settled that allowances to receivers and attorneys are within the sound discretion of the trial court, and ‘appellate courts are not much inclined to interfere with the exercise of this discretionary power of courts of first instance. The lower court ordinarily has better knowledge of the controlling circumstances than an appellate tribunal can have.’ *Eames v. H. B. Claflin Co.* (C. C. A.) 231 F. 693, 696.”

The award of attorneys’ fees in amounts considerably larger than in the instant case have been approved as a proper exercise of judicial discretion in many instances in various types of actions in which such awards are permitted to the prevailing party. For example, see *Strauss v. Victor Talking Machine Co.*, 297 Fed. 791 (C. C. A. 2, 1924), where a fee of \$30,000 was approved; *William H. Rankin Co. v. Associated Bill Posters*, 42 F. 2d 152 (C. C. A. 2, 1930), approving a \$42,500 award of attorneys’ fees; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45 (C. C. A. 2, 1939), \$33,000 in attorneys’ fees in a copyright infringement suit.

In view of the fact that this action has been prosecuted by appellants on a fraudulently obtained patent, in view of the many prior cases filed by these appellants against others on this same patent, in view of the undue prolongation of the trial and the other special circumstances stated above, and in view of the obviously vast amount of work required of appellee’s counsel in preparation and trial, it is submitted that the attorneys’ fees and costs awarded to appellee was a proper exercise of discretion of the trial court.

D. Jurisdiction as to the Unfair Competition Should Be Affirmed.

1. Appellants Unjustifiably Attempt to Change Their Position on the Jurisdiction Issue.

Appellants having filed and prosecuted this case for trade-mark infringement and unfair competition, and having obtained an order from the District Court sustaining its jurisdiction to do so, and having *lost the case on the merits*, now attempt to change their position and attack the jurisdiction of the District Court. This, we respectfully submit, violates every principle of fair dealing and, indeed, suggests a flagrant and irresponsible abuse of process of the Federal Courts. It is an illustration of the type of tactics with which the defendant-appellee has had to contend throughout this action.

In the second cause of action, the complaint charged trade-mark infringement and unfair competition [R. 5-7]. Defendant-appellee moved to dismiss for lack of jurisdiction [R. 8]. This was strenuously opposed by plaintiffs-appellants [R. 9-16], and after argument in open court the District Court held for plaintiffs-appellants that it had such jurisdiction and denied defendant-appellee's motion [R. 9]. The case was tried on this state of facts, and plaintiffs-appellants presented extensive evidence on the trade-mark and unfair competition questions.

Not until after appellants had lost this case on the merits, and not until after the notice of appeal [R. 155] was filed, did appellants even intimate that they would attack the jurisdiction of the trial court to hear the unfair competition issues. So long as appellants were before the trial court they carefully refrained from raising such issue. We suggest that had appellants been successful

on the unfair competition issues in the trial court, we would find them now vigorously defending its jurisdiction.

It is axiomatic in the law that where a party has adopted a position in a lawsuit and the case has been fully tried and determined in accordance with the party's theory, the party cannot, to suit his own convenience and purposes, attempt to reverse his position upon appeal in the appellate court.

See:

Sacramento Suburban Fruit Lands Co. v. Melin,
36 F. 2d 907 (C. C. A. 9th 1929);

Foster & Kleiser Co. v. Special Site Sign Co., 85
F. 2d 742, 751 (C. C. A. 9th 1936);

Saulsbury Oil Co. v. Phillips Petroleum Co., 142
F. 2d 27, 34 (C. C. A. 10th 1944).

It is therefore submitted that under the facts and law appellants have no standing before this Court on the jurisdiction issue, and that their appeal as to this issue should be summarily dismissed.

2. The Jurisdiction Question Is Not Properly Appealable.

The District Court's order sustaining its jurisdiction over the trade-mark and unfair competition issues [R. 9] was sought by appellants [R. 9-16] and was wholly favorable to them. It was merged in Conclusion of Law I [R. 144].

It is elementary in the law that a party may not appeal from a judgment, order, or portion thereof favorable to himself.

See:

Cochran v. M. & M. Transp. Co., 110 F. 2d 519 (C. C. A. 1, 1940);

Guarantee Co. of North America v. Phenix Ins. Co. of Brooklyn, 124 Fed. 170 (C. C. A. 8, 1903);

Galloway v. General Motors Acceptance Corp., 106 F. 2d 466 (C. C. A. 4, 1939);

Harding v. Federal Nat. Bank, 31 F. 2d 914 (C. C. A. 1, 1929);

Olsen v. Jacklowitz, 74 F. 2d 718 (C. C. A. 2, 1935);

Houchin Sales Co. v. Angert, 11 F. 2d 115 (C. C. A. 8, 1926);

4 Corpus Juris Secundum, Appeal and Error, §183, pp. 359, 360, 361.

It is therefore submitted that the jurisdiction question was not appealable by appellants, and that there is nothing properly before this Court in connection therewith.

3. No Prejudice Has Resulted to Appellants as a Result of the District Court Sustaining Its Own Jurisdiction.

The complaint in this action has been dismissed by the District Court [Judgment V, R. 148]. Appellants, by their appeal on the jurisdictional question, simply ask that the complaint be dismissed on grounds other than those relied upon by the District Court. Dismissal is the result in any event. Obviously, appellants have not been prejudiced by the District Court's action in sustaining its jurisdiction, which appellants themselves sought.

It is well established that a judgment, order, or portion thereof, will not be reversed by an appellate court where no prejudice to the appellant has resulted.

See:

Section 2111, Title 28, U. S. C.;

First National Bank of Decatur v. Home Savings Bank., 88 U. S. 294, 22 L. Ed. 560 (1874);

Wilson Co. v. Third Nat. Bank, 103 U. S. 770, 26 L. Ed. 488 (1880);

Lancaster v. Collins, 115 U. S. 222, 29 L. Ed. 373 (1885);

Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927 (1921).

4. The Trial Court Had Jurisdiction as to the Unfair Competition Questions.

The District Court heard the evidence, and concluded that it had jurisdiction of the subject matter [R. 144]. The transcript of the trial is not before this Court and hence there is no factual showing upon which a contrary conclusion could be drawn.

The relevant statutory provision conferring jurisdiction is Section 1338(b) of Title 28, U. S. C., as follows:

“(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws.”

Appellants admitted (and urged) before the District Court that their claim for unfair competition was “related” to the claim for patent infringement, as follows:

“The element of unfair competition arises not merely because of the palming off by the defendants of their goods for that of the plaintiffs, but basically stems from the unlawful use by the defendants of the patented process of the plaintiffs . . .” [R. 12.]

.

“Activities resulting in unfair competition are not necessarily confined to display and sale of the product to the public but entails numerous consecutive acts from the inception to fulfillment of the unlawful purpose. One such act is the appropriation by the defendants of the process patented by the plaintiffs.” [R. 12.]

.

“ . . . The sale of the infringing product of the patent process is not to be disregarded in determination of the element of unfair competition. Such element constitutes a basis and ground for the cause of action and should be accorded consideration in view of the surrounding circumstances.” [R. 13-14.]

.

“ . . . The cause of action presented in the complaint is unquestionably and admittedly one of federal jurisdiction under the patent laws of the United States. The element of unfair competition as evidenced by the infringement of the State trade-mark registration is an integral part of the cause of action” [R. 15.]

.

“Therefore, a single cause of action is believed established in this case, since the sales of steaks made in infringement of the patent in suit is not only the basis for determining the amount of damages due the plaintiffs for infringement, but also are the identical sales that are complained of in the second count under unfair competition.” [R. 16.]

In view of appellants' admissions, *supra*, supporting the finding of jurisdiction, and the lack of any evidence to the contrary, the judgment should be affirmed.

E. Conclusion.

It is submitted that there is no substance whatever to the issues raised by appellants.

The award of attorneys' fees is plainly perfectly proper. The circumstances in this case are unusual, if not shocking. The patent in suit was obtained by fraud on the Patent Office. Appellants obviously have made a regular practice of suing on this fraudulently obtained patent. Appellants filed this action without probable cause, and unreasonably prolonged the trial. The District Court found that the amount of attorneys' fees was reasonable, and reduced it materially after a full presentation of argument thereon by appellants. Obviously, the District Court acted properly in its discretion in allowing the award in view of the unusual, oppressive, and unfair circumstances of the case.

Appellants come with poor grace in raising the jurisdictional issue. After a full trial on the merits on the unfair competition questions at their insistence, they now assert that after all the court really did not have jurisdiction. This is a sample of appellants' tactics throughout the case and plainly indicates why the District Court awarded substantial attorneys' fees. Appellants obtained the ruling that the District Court had jurisdiction, and cannot now appeal from that ruling in their favor. The case having been dismissed on the merits, the appellants were not prejudiced by the jurisdictional ruling, as the result is the same. Finally, there is no evidence to show

any lack of jurisdiction, and the evidence actually here on appeal confirms the fact that the District Court had jurisdiction.

It is respectfully submitted that the judgment should be affirmed, and that costs and attorneys' fees on this appeal should be allowed to appellee in view of the conduct of appellants in prosecuting this appeal.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,

FORD HARRIS, JR.,

WARREN L. KERN,

Attorneys for Appellee.

GEORGE M. BRESLIN,

BODKIN, BRESLIN & LUDDY,

Of Counsel.

No. 12403.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM J. DUBIL, EDWARD J. HUBIK, and EARL F.
SHORES,

Appellants,

vs.

RAYFORD CAMP & Co., and RAYFORD CAMP,

Defendants.

APPELLANTS' REPLY BRIEF.

C. G. STRATTON,

707 Van Nuys Building, Los Angeles 14,

Attorney for Appellants.

FILED

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TOPICAL INDEX

PAGE

I.

Ultimate question	1
Judges disagreed in this case.....	2
Outside the record.....	3
Alleged fraud	4
Shores not involved.....	4
Other suits	5
Concession?	6
Unreasonably prolonged?	6
Judge's reduction	7
\$15,000.00 unreasonable	8

II.

Re jurisdiction of second cause of action.....	10
Re prejudice and factual showing.....	13
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Caesar v. Burgess et al., 103 F. 2d 503.....	12
Gomez v. Granat Bros., 177 F. 2d 266.....	7
Hurn v. Oursler, 289 U. S. 238, 77 L. Ed. 1148.....	11
Leidecker Tool Co. v. Laster et al., 39 F. 2d 615.....	12
Mason v. Hitchcock et al., 108 F. 2d 134.....	12
Straus v. Victor Talking Mach. Corp. et al., 297 Fed. 791.....	9

RULES

Federal Rules of Civil Procedure, Rule 12(h) (2).....	11, 12
Federal Rules of Civil Procedure, Rule 73(d).....	2
8 Federal Rules Decisions 271.....	7

STATUTE

United States Code Annotated, Title 35, Sec. 70.....	4
--	---

TEXTBOOKS

35 Corpus Juris Secundum, pp. 921-923.....	11
Moore's Federal Practice, pp. 2122-2123.....	15

No. 12403.

IN THE

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vs.

RAYFORD CAMP & Co., and RAYFORD CAMP,

Defendants.

APPELLANTS' REPLY BRIEF.

I.

ULTIMATE QUESTION.

Having now read both the appellants' and appellees' briefs, the Court may ask itself the ultimate question in this case concerning the attorneys' fees, to wit, is \$15,000.00 a reasonable attorneys' fee for a 9-days' trial and the usual preliminary matters such as were had in this case?

That sum might be a reasonable attorneys' fee for the Victor Talking Machine Company, an Association of Bill Posters of the United States and Canada, or the Metro-Goldwyn-Mayer Pictures Corporation. These three multi-million dollar corporations or group of corporations were

the parties against which attorneys' fees in excess of \$15,000.00 were awarded (Appellees' Br. p. 9). However, that amount of attorneys' fees for the three relatively poor men—the appellants here—would mean absolute or near financial ruin. The visiting judge who tried this case and entered that enormous fee must have thought that because this case was tried not far from Hollywood, the attorneys' fee must be "colossal."

Judges Disagreed in THIS Case.

With the exception of the Findings, Conclusions and Judgment, all matters both before and after the trial of this case were heard and decided by Judge León R. Yankwich, of the Southern District of California, whose case this was. After the record in this case was complete, and following the uncertainty of the out-of-state trial judge who did not know whether he wanted to assess \$15,000.00, \$12,000.00 or \$20,000.00 [Tr. 143 and 146] as a reasonable attorneys' fee, Judge Yankwich held that a \$1,000.00 *supersedeas* bond was sufficient in this case! He coupled this with the requirement that the appellants not dispose of or encumber their businesses or file voluntary petitions in bankruptcy without Court approval and notice to the other side [Tr. 154-5].

Over the strenuous objection of the appellees, this was granted on Appellant's Petition under Rule 73(d) whereby "for good cause" the Court could fix a different amount of bond than the judgment. The appellants contended in connection with such Petition that an attorneys' fee of this size was an abuse of discretion of the Lower Court,

out of line with the other precedents of said Court, that there was no evidence of the amount of preparation for this case, that there was no evidence as to what amount the defendants had paid their attorneys in this case, how much the defendants owed such attorneys or how much was charged the defendants for this case, and that it would be a severe hardship on the plaintiffs to have to put up a \$15,000.00 bond [Tr. 152-3].

Apparently agreeing with these arguments, Judge Yankwich held that “good cause” had been shown, for entering the order for \$1,000.00 bond, with the provisions stated above.

Thus, it is submitted, the other judge who sat in this case, Judge Leon R. Yankwich clearly expressed his disapproval of such an excessive attorneys’ fee. Thus the judges who sat in the Lower Court in this case did not agree that \$15,000.00 was a reasonable attorney’s fee.

Outside the Record.

Appellees’ brief claims on page 3 that “Appellants’ Brief discusses many matters not shown by the record on appeal” without mentioning a single instance. An effort was specifically made by the appellants in their Appellants’ Brief not to mention anything outside the record. If anything crept in (and none is known at this time), it was inadvertent and indirect and not at all intentional.

This may have been a mere excuse for the many occasions where the appellees brought in matters that were not only not in the record on appeal, but not even in the record at any time in this case. They will be pointed out from time to time in this Reply, at the respective points.

Alleged Fraud.

As to the statement by appellees' counsel that the undersigned was the "instrument" by which the Hubik affidavit, which they claim contained "misrepresentations," was submitted to the Patent Office, either of two inferences is to be drawn from this. Either it is entirely immaterial in this case, and, therefore, should have been omitted, or if it is intended to mean that the undersigned knowingly submitted misrepresentations to the Patent Office, then it is false and entirely unwarranted, and exception is taken to it on the ground that such inference is an absolutely untrue one.

Shores Not Involved.

There appear to be several things to be considered in considering the appellees' argument that the excessive attorneys' fee should be allowed to stand, not because it is "reasonable" as required by 35 U. S. C. A. §70, but because of alleged fraud. The first thing that appears from appellees' own brief is that this pertains to the "appellants (at least, Dubil and Hubik, the patentees)." From this carefully framed statement, it will be noted that they are anticipating the statement about to be made: There is not one single word in the Findings, Conclusion or Judgment (or the entire record for that matter) to the effect that the appellant Earl F. Shores had ever had any knowledge whatsoever of such alleged misrepresentation until the trial of this case.

The Trial Judge thought "Edward H. Hubik and Earl F. Shores are now the owners" of the patent in suit [Opinion, Tr. 99]. The Findings, written by counsel, corrected this: "At all times . . . Dubil and Hubik have each owned an undivided one-half interest therein" [Tr. 130]. Shores is only a licensee in part of Los An-

geles County [Tr. 131]. He has no other interest in the patent in suit. This confusion of the Trial Judge appears to be the reason why he included the appellant Shores in the assessment of the extremely large attorneys' fees. In all fairness, it should be said that the Appellees' Brief does not claim that Mr. Shores had anything to do with it. Therefore, any attorneys' fee assessed on the ground of such alleged misrepresentation should not be assessed against the appellant Shores. The attorneys' fee, it is submitted, should be reversed for this reason alone.

However, the attorneys' fee statute should not be used as a penalty, even against the appellants Dubil and Hubik. If Mr. Hubik's statements were knowingly not correct (and this is emphatically denied because all the facts were not brought out at the trial), that matter should be brought up in an appropriate proceeding and then the whole matter could be gone into. It is submitted that the new provision for "reasonable" attorneys' fees should not be used to fine a person collaterally when he has never been tried on that ground.

As one of the attorneys on the brief *amici curiae* in this case expressed it, "Even the fine for perjury would not be any such amount as \$15,000.00!"

Other Suits.

The only other suit on the present patent even mentioned in the record here is the case of *Dubil and Hubik v. Landau and Levy* [Tr. 166-180, and 189-190]. Thus the statement in appellees' brief (p. 4) of "a number of suits filed by appellants against others charging infringement" of the patent in suit, is (a) not in the record, and (b) not true. As far as known, these particular appellants have never before filed a suit altogether, on this patent or upon any other patent.

The one suit mentioned in the record is the one in which the Lower Court held the patent in suit valid not only in the consent decree against Landau, but also in the strongly contested case against Levy.

Any argument based upon the file wrapper of the patent in suit (as done in the first full paragraph on page 5 of Appellees' Brief) is wholly outside the record and to be ignored.

Concession?

Appellees state that the "appellants concede that the patent in suit was obtained by fraud" (p. 5). That is not correct. It is true they have not appealed from the holding of misrepresentation mentioned hereinbefore. However, it was not done because of a concession, but frankly, because due to the already high cost of this case, appellants face bankruptcy or nearly so, if this Honorable Court should sustain the \$15,000.00 attorneys' fees. Fees of that magnitude would make patent litigation for relatively poor individuals a "rich man's privilege." Appellants had hoped that a determination of the unfairness of that assessment of attorneys' fees could be made by this Honorable Court without the expenditure necessary to print the testimony of nine days of trial, which as this Court knows, is no small item.

Unreasonably Prolonged?

Appellees cite the Finding of the Lower Court that the trial was "unreasonably prolonged" by appellants. Since this issue is not dependent upon oral testimony nor disputed questions of fact but upon undisputed matters in the record (see Appellants' Br. p. 8) this Court appears to have full power to reverse the Findings and Conclusions of the Lower Court, as it did in the case of *Gomez v.*

Granat Bros., 177 F. 2d 266 (C. C. A. 9, Oct. 1949). Also, as stated by Judge Yankwich in 8 Fed. Rules, Dec. 271,

“Once they determine that a cause was improperly decided, neither the Circuit Court of Appeals nor the Supreme Court hesitates to disregard findings.”

Thus when the appellees argue that the trial judge was the “best judge of this,” the appellants’ answer is that the record does not bear out this argument. Appellees also contend that there is no evidence tending to show that this finding of “prolonging” the trial is incorrect. The nine days of trial alone refutes this. If appellants’ attorney had just sat in the courtroom for nine days without doing anything, \$15,000.00 would still be an enormous fee.

The statement that appellants’ counsel represented to Judge McCormick and Judge Yankwich that this case would take only two or three days to try in its entirety is (a) another thing not contained in the record in this case, and (b) not in accordance with the remembrance of the appellants’ counsel.

It is believed that the analysis of the time spent, as shown by the record in this case, as given on page 8 of Appellants’ Brief, clearly shows that appellants did not as a matter of fact “prolong” the trial. Certainly no useful purpose would have been gained by it, and \$15,000.00 would be unreasonable even if it had been “prolonged” to only nine days.

Judge’s Reduction.

Appellees claim (p. 7) that the appellants’ argument now made is substantially the same made to the Lower Court. As anywhere near an exact statement, this is far from the truth, and here again, we find another place

where the appellees depart from the record of this case. If some of the arguments did cause the trial judge to reduce the “already reasonable” attorneys’ fees from \$20,000.00 to \$15,000.00, it shows that the trial judge admitted that he was in error in the amount of \$5,000.00 or 25% of his original holding!

If some of the same arguments were made to Trial Judge Cavanah, those same arguments were also made to Judge Yankwich, and the latter reduced the amount of the bond from \$15,000.00 to \$1,000.00, which would seem to be more in line with what a reasonable attorneys’ fee should be—if any is to be assessed in this case. Judge Yankwich apparently thought \$1,000.00 would be reasonable.

The appellees contend that appellants got a “*bargain*” when the trial judge reduced the attorneys’ fee 25% or \$5,000.00. That is not the interpretation the appellants place upon this reduction. This is believed to show the confusion in the Lower Court’s mind as to whether \$12,000.00, \$15,000.00 or \$20,000.00 should be the figure that he would pick out of the air.

\$15,000.00 Unreasonable.

Appellees’ Brief states (p. 7), “The record on appeal and particularly the docket entries [R. 158-165] indicate . . . the extensive preparation required . . . of appellees’ *three* counsel” (*italics added*). This statement is certainly challenged. There is absolutely nothing either in the Docket Entries, in the rest of the record here, or in the record below about what time was required by appellees’ several counsel prior to the trial. At the trial, appellees had three attorneys sitting at the defense table throughout the case (except that one of them took one day off). Suppose there had been *nine* attorneys sitting

there. If there had, by the appellees' reasoning, charges for these should also have been included in the attorneys' fees.

Of the three attorneys representing the appellees at the trial, one never said a word throughout the trial. A second one cross-examined a short witness while the attorney who conducted most of the trial just sat at the defense table. The one principal attorney could easily have also cross-examined this additional witness. Thus only one man's time should be charged for (if any charge is to be made).

Apropos of the fact that in most cases the Lower Court has assessed no attorneys' fees in patent cases (Appellants' Br. p. 22), and that the out-of-state trial judge in this case entered attorneys' fees for almost five times as great as the highest ever assessed in the Lower Court by the resident judges, is the appellees' own citation of *Straus v. Victor Talking Mach. Corp. et al.* (C. C. A. 2), 297 Fed. 791, 805:

"A reasonable attorney's fee in New York, for New York attorneys, is to be measured by New York standards of fees ordinarily charged."

Appellees admit in their brief (p. 7) that it is not shown by the record (and it might have been added that it was not shown by the record below) what was charged by appellees' counsel either for fees or expenses. Nevertheless, they dragged the sum of \$18,000.00 into their brief. If the appellees were charged \$18,000.00 for attorneys' fees and expenses up to but not including the hearing of this quite ordinary patent infringement case, then without equivocation we say that is very, very excessive!

Since appellees are now presenting this for the first time, without giving appellants the opportunity of cross-examination with regard to such allegations, it is submitted that the award of attorneys' fees should be reversed, or at least sent back to the Lower Court, so appellants could have "their day in court" *re* same.

II.

RE JURISDICTION OF SECOND CAUSE OF ACTION.

On page 2 of their brief, appellees mention twice that the appellants challenge the jurisdiction of the Lower Court to try the unfair competition issues. On neither occasion do they state that appellants also contend that the matter of infringement of the State-registered trademark should not have been tried in this case.

It should also be remembered that the patent in suit is on the process of making steaks and not upon the steaks themselves. Thus infringement upon the patent in suit is by carrying out the process—not selling the steaks.

A rather unusual position is taken by appellees in their brief in reply to appellants' contention that the Lower Court lacked jurisdiction to try the second cause of action in the Complaint. They do not go back on a single argument that they made [Supp. Tr. 203-212] in the Lower Court to the effect that the Lower Court did not have jurisdiction. Their argument here is that the appellants cannot now raise the question of jurisdiction because the matter was decided in favor of the latter below. However, the authorities they cite (Appellees' Br. 11-12) do not pertain to raising the question of jurisdiction. It is basic

that this can be raised at any time. When a case is outside the jurisdiction of the Federal Court, it is:

“Subject to dismissal at any stage of the case.”
—*Hurn v. Oursler*, 289 U. S. 238, 248, 77 L. Ed. 1148 (which case is the leading one on the question of jurisdiction, but it never was so much as mentioned in appellees’ brief).

See also Rule 12(h)(2) of the Rules of Civil Procedure,

“*Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”
(Italics added.)

It is believed that the word “whenever” in the last quotation is all-inclusive. That is, the parties are never foreclosed from raising the question of jurisdiction. If the Lower Court had no jurisdiction, no action or inaction of the parties would confer jurisdiction upon the court.

Corpus Juris Secundum, cited by the appellees as an authority in their favor, appears to be against them on this point. See the following in 35 Corpus Juris Secundum 921-3:

“Where a case is not within the general federal jurisdiction or, as otherwise stated, where jurisdiction of the subject matter or controversy is lacking, such want of jurisdiction is fatal at every stage of the proceeding. Such want of jurisdiction is not cured by the fact that jurisdiction of the person of the defendant has been obtained, or by the consent of the parties, *or by waiver of the objection*; as otherwise frequently stated, jurisdiction in such case cannot be conferred by the consent of the parties, or by waiver of the objection. The foregoing rules as to consent

and waiver include objections based on want of requisite diversity of citizenship, or on want of the requisite jurisdictional amount.

“The general rule is that the objection for want of jurisdiction of the controversy or subject matter may be made at any stage in the proceeding.” (Citing Rule 12(h), *supra*.) (Italics added.)

See also *Leidecker Tool Co. v. Laster et al.* (C. C. A. 10), 39 F. 2d 615:

“ . . . jurisdiction cannot be conferred by consent or waiver.”

In *Mason v. Hitchcock et al.* (C. C. A. 1), 108 F. 2d 134, 136, counsel argued that defendants waived the question of jurisdiction by making a general appearance. The court said:

“ ‘Consent of the parties can never confer jurisdiction upon a federal court. Any jurisdictional fact prescribed by the statute is absolutely essential, and cannot be waived, and the want of it may be raised at any stage of the cause.’ U. S. Envelope Co. *et al.* v. Transo Paper Co. *et al.*, D. C., 229 F. 576, 579; Chicago B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 31 S. Ct. 460, 55 L. Ed. 521.”

In *Caesar v. Burgess et al.* (C. C. A. 10), 103 F. 2d 503, the question of jurisdiction “was not presented in any form to the court below.” The court said:

“It is raised here for the first time, but since it relates to jurisdiction of the subject-matter it may be raised at any time.”

Re Prejudice and Factual Showing.

The appellees' argument of "no prejudice" (p. 12) appears to be based upon the premise that even though the Lower Court did not have jurisdiction, it does not prejudice the appellants' rights anyway. This is believed entirely without foundation. There is decided prejudice. If the Lower Court had no jurisdiction, then the decision holding the State-registered trade-mark invalid and no unfair competition is decidedly prejudicial to the appellant's trade-mark and unfair competition rights. Nothing could be more prejudicial to the State-registered trade-mark than to hold it invalid. Nothing could be more prejudicial to the appellants' unfair competition rights than to hold that they had none.

Furthermore, appellees claim there is "no factual showing" (p. 13) upon which to base lack of jurisdiction. The answer to that argument is the Complaint itself. The appellees brought their "Motion to Dismiss the Second Count of Plaintiffs' Complaint for Lack of Jurisdiction" upon the Complaint alone. If the Lower Court had no jurisdiction over the question of infringement of the State-registered mark and over unfair competition between citizens of the same state (all of which is alleged in the Complaint), then no amount of testimony of such infringement or of such unfair competition between citizens of the same state would confer any jurisdiction. The trial of the case could not and did not add anything to change these facts alleged in the Complaint.

Appellees' Brief calls the arguments given by the Appellants in the court below, in support of the court's jurisdiction, "admissions." They, of course, were not admissions, but arguments.

The true situation is that the present argument, contained in Appellants' Brief and in this Brief, is made after conferring with two other patent lawyers who suggested to the undersigned that in their opinion the Lower Court in this case did not have any jurisdiction to try the matter of the infringement of a State-registered trade-mark and a matter of unfair competition between citizens of the same State, in a Federal Court, whether they were coupled in the same Complaint with a charge of patent infringement or not. That was after the judgment was rendered below and after the argument was made below. This was the direct cause of making the present argument.

It will be significantly noted that nowhere do the appellees state that the arguments given by the appellants below (quoted in their brief on pp. 13-14) are in accordance with their opinion, or that such arguments are well taken. On the other hand, the appellants refer to and incorporate in appellants' brief the entire argument which was submitted below by appellee [Tr. 30], which is now believed to be the correct view. On occasions the Supreme Court has been known to change its mind. Without in any way making a personal comparison to the Supreme Court, perhaps that privilege could be accorded one individual attorney.

An additional authority coming to the attention of the undersigned is *Moore's Federal Practice*, pp. 2122-3, reading as follows:

"If, however, two or more independent causes of action are involved, each must have a jurisdictional basis. If there is a federal basis for cause of action 1, but there is none for cause of action 2, then the latter may not be joined, or if joined, *it must be dismissed*, unless there is diversity or alienage to support the second cause of action." (Italics added.)

"The venue must be proper as to *each* cause of action." (Italics added.)

Conclusion.

In conclusion, it is submitted that the award of attorneys' fees should be reversed (a) as to the appellant Shores because he had no part whatever in any alleged misrepresentations to the Patent Office, (b) as to the appellants Hubik and Dubil because they should not be fined collaterally by calling a fine "attorneys' fees", and because \$15,000.00 is entirely unreasonable as attorneys' fees for this ordinary, patent infringement action.

It is submitted that if any attorneys' fee is to be awarded that this matter be sent back to the Lower Court to determine what would be reasonable, if anything, for the respective appellants, in view of appellant Shores' entire lack of knowledge of any alleged misrepresentations.

The lack of jurisdiction of the Lower Court to try the second count of the Complaint with regard to the in-

fringement of the State-registered trade-mark and the question of unfair competition between citizens of the same state, is believed clear in the presnt case where the patent sued upon is only a process patent. A process patent can of course only be infringed by carrying out the process. Sale of the product of the process (which is all that is involved in the trade-mark infringement and the unfair competition) is not involved in the federal question.

It is significant that appellees do not deny in their brief that the Lower Court lacked jurisdiction to try said second count.

Reversal is believed in order on both of the two grounds of appeal.

Respectfully submitted,

WILLIAM J. DUBIL,

EDWARD J. HUBIK and

EARL F. SHORES,

By C. G. STRATTON,

Attorney for Appellants.

No. 12405

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

ROTHSCHILD INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FEB 3 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12405

United States
Court of Appeals
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UNITED STATES OF AMERICA,
Appellant,
vs.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	8
Answer to Third Party Respondent.....	14
Appeal:	
Appellant's Designation of Statement of Points on.....	277
Citation on.....	27
Counter Designation of Apostles on.....	280
Designation of Apostles on.....	278
Petition for Appeal and Order for.....	26
Appellant's Designation of Statement of Points on Appeal.....	277
Assignment of Errors.....	28
Citation on Appeal.....	27
Clerk's Certificate.....	273
Counter Designation of Apostles on Appeal...	280
Designation of Apostles on Appeal.....	278
Exhibits, Respondent's:	
A-1—Statement by Alfred Dillon.....	135
A-2—Warshipsteve Contract.....	205

INDEX	PAGE
Findings of Fact and Conclusions of Law.....	17
Conclusions of Law.....	22
Findings of Fact.....	18
Judgment and Decree.....	24
Libel in Personam.....	2
Names and Addresses of Proctors.....	1
Notice of Application for Order Impleading Third Party.....	11
Order Allowing Third Party Petition.....	12
Petition for Appeal and Order for Appeal.....	26
Praecipe	6
Stipulation for Costs.....	6
Transcript of Proceedings at Trial.....	30
Deposition of Bauer, Kristian.....	169
Deposition of Palmer, Frank.....	136
Witnesses, Libelant's:	
Brooks, Dan	
—direct	89
Dillon, Alfred L.	
—direct	34, 254, 262
—cross	68
—redirect	87

INDEX

PAGE

Witnesses, Libelant's—(Continued):

Rigney, Paul

—direct	91
—cross	96

Sellman, Claud

—direct	103, 257
—cross	110
—redirect	118
—recross	119

Witnesses, Respondent's:

Ness, Louis

—direct	120
—cross	123
—redirect	124

Packard, Martin

—direct	124
—voir dire.....	129

Petri, Jacob

—direct	182
—cross	197

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Seattle 1, Washington,
Proctor for Appellee.

In the District Court of the United States for the
Western District of Washington, Northern Division
No. 15131

ALFRED L. DILLON,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

Libellant for cause of action alleges as follows:

I.

That at all times mentioned herein libellant was, and is now, a resident of Seattle, Washington, said place being in and within the territorial confines over which the above entitled Court has jurisdiction.

II.

That at all times hereinafter mentioned, the United States of America was the owner and operator of the M. S. Goucher Victory and at all times said vessel was employed as a merchant vessel in navigable waters at Seattle, Washington.

III.

That prior to the 13th day of May, 1946, the respondent, through its agent, the Union Sulphur Co., Incorporated, entered into a contract with the Rothschild International Stevedoring Company, said stevedoring company agreeing to act, and acting

at all times mentioned in this complaint, as an independent contractor having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said vessel, the M. S. Goucher Victory, in the Port of Seattle in the navigable waters of Puget Sound at Seattle, Washington.

IV.

That as an independent contractor, the Rothschild International Stevedoring Company hired the libellant, Alfred L. Dillon, as a longshoreman and entered upon the performance of said contract, and that libellant at all times herein mentioned acted under the orders of the Rothschild International Stevedoring Company, in its capacity as an independent contractor and employer and not as an agent or employee of said respondent.

V.

That on or about the 13th day of May, 1946, at about the hour of 9:30 P. M., the libellant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 hold and was in the act of preparing to guide a strongback into the slot provided as a resting place for said strongback on the port combing of said deck, and while using due care and caution on his part, the said strongback suddenly and without warning fell and caught libellant's right hand, crushing the same and seriously injuring libellant, as hereinafter more fully alleged.

VI.

That the said injuries and damages to the libellant were solely and proximately caused by the negligence of the respondent, its agents and employees, by the unseaworthiness of said vessel, failure to provide libellant with a safe place in which to work, and failure to keep in order and in proper condition, the gear, tackle, apparel and appliances belonging to said vessel, in that the automatic brake on the winch which was being used to suspend said strongback was in a dangerous, faulty and defective condition; that by reason of said condition, the said automatic brake slipped, thereby causing said strongback to suddenly fall upon the said hand of libellant; that said winch was unfit and unsafe for the purpose for which it was intended, and as such constituted a hazard and menace to the lives and limbs of men required to work in connection with the same; that the existence of this defective condition was known to respondent, its agents, servants and employees, or in the exercise of due care, caution and inspection on the part of said respondent, its agents, servants and employees, who should have known of said defective condition; that as a direct and proximate result of the negligence of the respondent, as aforesaid, libellant, Alfred L. Dillon, received the following injuries, to-wit: Severe wrenching of the right shoulder, crushing of the right hand; that said right hand has been rendered totally and permanently useless by reason of said

crushing; that libellant sustained a severe nervous shock and suffering and will continue to suffer for a long time to come, extreme pain and suffering and mental anguish; that libellant was confined to a hospital; that libellant's health and vitality are permanently impaired as a result of the injuries received, as aforesaid; that libellant is totally disabled from following his occupation as a longshoreman; that at the time of receiving said injuries, libellant was an able-bodied man of the age of 56 years, with a life expectancy of 16.72 years; that ever since said accident, libellant has been under the treatment of physicians and surgeons; that libellant has incurred expenses for physicians, surgeons and medical treatment, X-ray and hospitalization and other expenses, in an amount now unknown to libellant; that ever since said injuries libellant has been and is now totally incapacitated, and will be permanently incapacitated from following a gainful occupation; that by reason of the injuries aforesaid, libellant has been damaged in the sum of \$50,000.00.

Wherefore, libellant prays for judgment in the sum of \$50,000.00, together with costs and disbursements herein to be taxed.

ZABEL, POTH & PAUL,
By /s/ PHILIP J. POTH,
Attorneys for Libellant.

[Endorsed]: Filed Oct. 29, 1947.

District Court of the United States
Western District of Washington

No. 15131

ALFRED L. DILLON,

vs.

UNITED STATES OF AMERICA,
Respondent.

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please issue Citation to respondent.

ZABEL, POTH & PAUL,

By /s/ FREDERICK PAUL,

Proctors for Libellant.

[Endorsed]: Filed Oct. 29, 1947.

[Title of District Court and Cause.]

STIPULATION FOR COSTS

Know All Men By These Presents:

That the undersigned, Alfred L. Dillon, as Principal, and National Surety Corporation, a corporation, organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Whom It May Concern in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which sum well and truly to be made, they do hereby bind themselves, and their respective

successors and assigns, jointly and severally, firmly by these presents.

The Condition of this obligation is such that,

Whereas, a libel has been filed in the above entitled Court by the above named libelant against the above named respondent, for the reasons and causes in said libel mentioned; and,

Whereas, the above named Principal has filed a libel in the above entitled Court in the said cause, claiming damages on account of injuries sustained;

Now, Therefore, if the above bounden Principal shall abide by and pay all costs and expenses which shall be awarded against him by the final decree of said Court in said cause, or by any interlocutory order of said Court in the progress of said cause; or in case of appeal, by any appellate Court, then this obligation shall be void; otherwise, it shall be and remain full force and virtue.

In Witness Whereof, said Principal has hereunto subscribed his name, by his attorneys and agents, and said Surety has hereunto subscribed its name and affixed its seal, this 31 day of October, 1947.

ZABEL, POTH & PAUL,

By /s/ OSCAR A. ZABEL,

Attorneys for Principal.

(Principal)

NATIONAL SURETY
CORPORATION,

[Seal] By /s/ GORDON SPINS,

As Its Attorney-in-Fact.

(Surety)

[Endorsed]: Filed October 29, 1947.

[Title of District Court and Cause.]

ANSWER

Comes now United States of America, Respondent herein, and for answer to the Libel on file admits, denies and alleges as follows:

I.

Answering Article I, Respondent has no knowledge or information sufficient to form a belief as to the matters alleged therein and therefore denies the same.

II.

Answering Article II, Respondent admits the same.

III.

Answering Article III, Respondent admits the same.

IV.

Answering Article IV, Respondent has no knowledge or information sufficient to form a belief and therefore denies the same.

V.

Answering Article V, Respondent denies the same.

VI.

Answering Article VI, Respondent denies each and every allegation therein contained.

Further Answering the Libel of Libellant, and by way of a First Affirmative Defense thereto, Re-

spondent alleges that if the Libellant has been injured and/or damaged, as in his Libel alleged, or at all, said injuries and/or damages were proximately due to the negligence of the Libellant in that Libellant placed his right hand in a careless and perilous position under the strongback which was being lowered instead of guiding the strongback into position by grasping it in a less hazardous position.

Further Answering the Libel of Libellant, and by way of a Second Affirmative Defense thereto, Respondent alleges that if the Libellant has been injured and/or damaged, as in his Libel alleged, or at all, said injuries and/or damages were proximately caused by and contributed to by the negligence of the fellow servants of Libellant, who were employed by the Rothschild International Stevedoring Company, in that the winch driver operating the winch did so in a negligent fashion and failed to heed the signals of the hatch tender to slack away on the winches.

Wherefore, having fully answered the Libel of Libellant, Respondent prays that it may be dismissed and recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,

United States Attorney.

By /s/ BOGLE, BOGLE & GATES,

Of Counsel,

Proctors for Respondent, United States of America.

United States of America,
Western District of Washington,
Northern Division—ss.

Edw. S. Franklin, being first duly sworn on oath
deposes and says:

That he is one of the proctors for the Respondent
above named; that he makes this verification for and
on behalf of said Respondent as he is authorized to
do; that he has read the foregoing answer, knows the
contents thereof and believes the same to be true.

/s/ EDW. S. FRANKLIN.

Subscribed and sworn to before me this 17th day
of March, 1948.

/s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 18, 1948.

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty No. 15131

ALFRED L. DILLON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROTHSCHILD-INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Third Party Respondent.

NOTICE OF APPLICATION FOR ORDER
IMPLEADING THIRD PARTY

To: Alfred L. Dillon, libelant above named, and to
Zabel, Poth & Paul, his proctors:

You and Each of You are hereby notified that
petitioner, United States of America, will apply to
the Honorable John C. Bowen, Judge of the United
States District Court, Western District of Wash-
ington, at 10:00 A. M. on Thursday, April 15, 1948,
for an order impleading Rothschild-International
Stevedoring Company as third party respondent

pursuant to Admiralty Rule 56. Please be governed accordingly.

/s/ BOGLE, BOGLE & GATES,
Of Counsel.

/s/ J. CHARLES DENNIS,
U. S. District Attorney,

Proctors for Petitioner, United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1948.

[Title of District Court and Cause.]

ORDER ALLOWING THIRD PARTY
PETITION

The above entitled cause having duly and regularly come on for hearing upon the 15th day of April, 1948, before the above entitled court, the undersigned Judge presiding, upon motion of respondent, United States of America, for an order permitting it to file under Rule 56, third party petition impleading an additional party as third party respondent, and the Court, after having examined the proposed third party petition, with proposed stipulation for costs, having become fully advised;

Now, Therefore, it is hereby Ordered that said motion be granted, that said petition be filed, and that citation be issued as prayed by said petition,

in conformity with the usual admiralty practice of this court, against said third party respondent, wherein the return date shall be designated as the 7th day of May, 1948.

Done in Open Court this 15th day of April, 1948.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ ROBERT V. HOLLAND,
Of Proctors for Respondent,
United States of America.

Approved as to form:

/s/ [Illegible.],
Proctors for Libelant.

[Endorsed]: Filed April 15, 1948.

In the District Court of the United States for
the Western District of Washington, Northern
Division

In Admiralty No. 15131

ALFRED L. DILLON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROTHSCHILD-INTERNATIONAL STEVE-
DORING COMPANY, a corporation,

Third Party Respondent.

UNITED STATES OF AMERICA'S
THIRD PARTY PETITION

Comes Now United States of America, the petitioner, (the respondent above named) and for its petition against Rothschild-International Stevedoring Company, a corporation, as third party respondent, under Admiralty Rule 56, in the above entitled cause, civil and maritime, alleges as follows:

I.

That during all times material, your petitioner, United States of America, through its then agency,

War Shipping Administration, now the United States Maritime Commission, was the owner and operator of a large fleet of vessels plying the various sea lanes of the world including the SS Goucher Victory.

II.

That the third party respondent, Rothschild-International Stevedoring Company, a corporation, now is and at all times herein material, was a corporation duly organized and existing under and by virtue of the laws of the State of Washington, engaged in the business of stevedoring cargo in various ports of the State of Washington. That in connection with said stevedoring operations, third party respondent, Rothschild-International Stevedoring Company, a corporation, entered into a written contract with the War Department, Transportation Corps, Seattle Port of Embarkation, on July 1, 1945, providing for the performance by third party respondent of all stevedoring operations at the Seattle Army Port of Embarkation to and including June 30, 1946. That said contract is designated officially as Contract No. W 45-045 tc-476 O. I. No. 13-46, which contract was in full force and effect on May 13, 1946.

III.

That on or about December 1, 1947, there was filed in the above-entitled court by libellant, Alfred L. Dillon, against petitioner as respondent, a libel in admiralty, being Cause No. 15131, wherein the libellant seeks to recover from your petitioner dam-

ages in the sum of Fifty Thousand Dollars (\$50,000.00) for physical injuries sustained by him on May 13, 1946, at the Seattle Port of Embarkation, while engaged as a stevedore aboard the SS Goucher Victory, and while employed by third party respondent, Rothschild-International Stevedoring Company, a corporation, because of the alleged unseaworthy condition of the vessel and its winches, as more fully appears from the libel on file herein, a copy of which is attached to this petition.

IV.

That to said libel, your petitioner, as respondent herein, has filed its answer, denying all liability for damages to libelant; that the issues so raised upon said libel continue pending without trial or adjudication.

V.

That said written stevedoring contract referred to above provides as follows:

“The Contractor (Rothschild-International Stevedoring Company), shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the fault or negligence of the Contractor’s officers, agents or employees,” subject to certain exceptions not material to this matter.

VI.

That the injury to libelant was directly and proximately caused by the negligence of the officers,

agents and employees of Rothschild-International Stevedoring Company, a corporation, third party respondent, in the following particulars:

(1) Failing to afford libelant, one of its workmen, proper supervision and a safe place in which to work.

(2) Negligence of the hatch tender at No. 1 hatch of the SS Goucher Victory in failing to warn the winch driver to shut off the winches before the strongback was lowered on libelant's hand and negligence of the winch driver after receiving such signal from the hatch tender in failing to promptly execute the same.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, petitioner prays that citation in due form of law, in harmony with the admiralty practice of the above entitled court, may issue against Rothschild-International Stevedoring Company, a corporation, citing it to appear and answer all and singular the allegations of this petition and of the original libel herein; that the above cause may proceed against said third party respondent as if originally made a party herein; and that if petitioner, notwithstanding its answer to said libel, and despite the denials thereof, be adjudged by this Court liable on account of negligence as alleged by said libel, then that the decree of this court grant judgment against said third party respondent for full indem-

nity in favor of this petitioner in accordance with the written stevedoring contract or for a joint tortfeasor's contribution to damages in favor of said petitioner against said third party respondent, and that petitioner may have such other relief as may be meet and just, including its costs and expenses.

J. CHARLES DENNIS,
U. S. District Attorney,

BOGLE, BOGLE & GATES,
Of Counsel.

Proctors for Respondent,
United States of America.

United States of America,
State of Washington, County of King—ss.

Edw. S. Franklin, being first duly sworn on oath deposes and says:

That he is a member of the firm of Bogle, Bogle & Gates and as such one of the proctors of record for the United States of America, petitioner; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

EDW. S. FRANKLIN.

Subscribed and sworn to before me this 12th day of April, 1948.

ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Feb. 9, 1950.

[Title of District Court and Cause.]

ANSWER TO THIRD PARTY RESPONDENT

Comes Now, Rothschild International Stevedoring Company, a corporation, Third Party Respondent, and for answer to Third Party Petition, admits, denies and alleges as follows:

I.

For answer to Article VI, Third Party Respondent denies each and every allegation, matter and thing therein contained.

II.

For answer to Article VII, Third Party Respondent denies each and every allegation, matter and thing therein contained.

Further Answering and by way of a First Affirmative Defense, Third Party Respondent Alleges:

I.

That if Libelant has been injured and/or damaged, as in his libel alleged, or at all, said injuries and/or damage were proximately caused and contributed to by the negligence of libelant, in that he voluntarily placed himself in a position of peril immediately prior to his alleged injuries, in that while guiding a strongback into the slot provided as a resting place for said strongback on the port combing of the deck, said libelant negligently and carelessly placed his right hand under the same in a position of obvious and apparent peril and danger.

That in the work in which the libelant was employed at the time, it was not at all necessary for him to place his hand where he did. That said libelant has been engaged in the work of stevedoring for many years and that he knew, or in the exercise of reasonable care should have known, that said action on his part was careless and absolutely dangerous.

Further Answering and by way of a Second Affirmative Defense, Third Party Respondent Alleges:

I.

That if the libelant has been injured and/or damaged, as in his libel alleged, or at all, said injuries and/or damage were proximately caused by and contributed to by the risks normally assumed by stevedores in their hazardous occupation. That said accident and the alleged injuries were not in any way caused or brought about by any negligence whatsoever on the part of the Third Party Respondent, or any of its agents, servants or employees.

Wherefore, having fully answered the Third Party Petition herein, Third Party Respondent prays that the same be dismissed with prejudice, that no relief be granted to the petitioner thereunder and that Third Party Respondent be given judgment for its costs and disbursements expended in this action.

/s/ W. E. DuPUIS,

Proctor for Rothschild International Stevedoring Company, a corporation, Third Party Respondent.

United States of America,
State of Washington,
County of King—ss.

W. E. DuPuis, being first duly sworn, upon oath deposes and says:

That he is the Proctor for the Third Party Respondent herein, that he makes this verification for and on behalf of said Respondent, that he is authorized so to do; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

/s/ W. E. DuPUIS.

Subscribed and Sworn to before me this 25 day of October, 1948.

[Seal] By /s/ RALPH E. FRANKLIN,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 25, 1948.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 2261

ALFRED L. DILLON,

Plaintiff,

vs.

UNION SULPHUR CO., INC., a corporation,
Defendant.

In Admiralty No. 15131

ALFRED L. DILLON,

Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent,

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROTHSCHILD-INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Third Party Respondent.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled causes having duly come on
for hearing before the above entitled court, without
a jury, on the 23 day of June, 1949, the Libelant
and Plaintiff being represented by Oscar A. Zabel,

his attorney; and the Respondent, United States of America, being represented by Bogle, Bogle and Gates, and Edward S. Franklin, and by J. Charles Dennis, United States District Attorney for the Western District of Washington, Northern Division, and the Defendant, Union Sulphur Co., Inc., a corporation, being represented by Bogle, Bogle and Gates and Edward S. Franklin, and the Rothschild-International Stevedoring Company, a corporation, Third Party Respondent, being represented by W. E. DuPuis. Opening statement on behalf of plaintiff and libelant, by his counsel, Oscar A. Zabel, having been made, evidence on behalf of Plaintiff was adduced thereafter. Opening statement on behalf of Defendant and Respondent and Third Party Respondent, by their respective counsel, having been made, and evidence in their behalf having been adduced, at the conclusion of which Plaintiff's and Libelant's rebuttal evidence was given, whereupon argument of respective counsel was then heard.

From the evidence in the above causes consolidated for trial, the court makes the following:

Findings of Fact

I.

That the defendant, Union Sulphur Co., Inc., is a corporation organized under the laws of the State of New York, and at all times hereinafter mentioned was the general agent of the M. S. Goucher Victory, a Merchant Vessel of the United States, which vessel was engaged in the transportation of cargo by water in interstate of Maritime Commerce under the gen-

eral agency agreement with the United States of America, being respondent's Exhibit A-3, and the court finds that the said defendant, Union Sulphur Co., Inc., a corporation, was not liable as a matter of law in this action and that the same should be dismissed as to said defendant.

II.

That the respondent, United States of America, was the owner and operator of the M. S. Goucher Victory and at all times said vessel was employed as a Merchant Vessel in navigable waters in Seattle, Washington.

III.

That prior to May 13, 1946, the respondent, through its agent, the United Sulphur Co. Inc., entered into a contract with the Rothschild-International Stevedoring Company agreeing to act, and acting at all times mentioned as an independent contractor having complete control and supervision of all operations pertaining to the loading and discharge of cargo from the said vessel, the M. S. Goucher Victory in the port of Seattle in the navigable waters of Puget Sound, Seattle, Washington.

IV.

That as an independent contractor, the Rothschild-International Stevedoring Company hired the libelant, Alfred L. Dillon, as a longshoreman and that the libelant acted under the orders of the Rothschild-International Stevedoring Co. in its capacity as an independent contractor and employer.

V.

That on or about the 13th day of May, 1946, at about the hour of 9:30 p.m., the libelant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 Hold and was in the act of guiding a strong-back into the slot provided as a resting place for said strong-back on the port coaming of said deck, and that while using due care and caution on libelant's part, the said strong-back suddenly and without warning fell and caught libelant's right hand injuring it as hereinafter more fully set out.

VI.

That the said injuries to libelant were proximately caused by the unseaworthiness of the said ship, and by the passive negligence of the Rothschild-International Stevedoring Co., in that the winches at the hatch where the libelant was working and in operation in connection with the job being done had defective and insufficient equipment, namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of said strong-back and the resulting crushing of the little finger on libelant's right hand and the finger next to that little finger, and also the tendons of the said fingers and the flesh and tissues of the said fingers.

VII.

That the winch brakes in question had been in that unseaworthy insufficient condition for some

time, long enough for the respondent, United States of America, to have discovered it and had time to have remedied it and repaired the said defect, and for a time long enough for the Third Party Respondent, Rothschild-International Stevedoring Co. to have, by reasonable inspection, ascertained and given attention to such unseaworthy and insufficient condition.

VIII.

That the respondent, United States of America, is liable for the unseaworthiness of the ship caused by such unseaworthy and insufficient equipment in and about the winches and the winch brakes; and that the Third Party Respondent, Rothschild-International Stevedoring Co. is guilty of passive negligence in that it failed to exercise due and ordinary care in furnishing the libelant and those persons working with him a sufficient instrumentality reasonably safe and suitable for doing the work in which libelant and other employees of the Rothschild International Stevedoring Co., were engaged at the time the accident occurred; and that such negligence on the part of the Rothschild-International Stevedoring Co. was a proximate cause of the accident and resultant personal injuries sustained by libelant.

IX.

That the libelant sustained injuries to his little finger and the finger next to that in his right hand, experiencing soreness for a long time in and about

those fingers and that in the process of favoring those fingers and giving up to the soreness of them, he has experienced some stiffness in the joints of those and other fingers at the large knuckles of his hand; in addition, libelant has received disability causing him to be unable to work as a longshoreman as a result of this accident, and received traumatic injury, namely, fractures in the little or fifth finger and in the finger next to that (described as the fourth finger) and traumatic injury to the tendons and flesh tissues in and about those fingers, and the court further finds that there is doubt as to whether said fingers will ever be normal again, as a proximate result of all which libelants right hand is in a very bad and largely disabled condition.

The Court further finds that the sum of \$7,500.00 is a reasonable and just sum to compensate the libelant for all of the injuries and damages sustained.

Done in Open Court this 25th day of July, 1949.

/s/ JOHN C. BOWEN,

Judge.

From the foregoing Findings of Fact, the Court reaches the following:

Conclusions of Law

I.

That the libelant, Alfred L. Dillon, have judgment against the respondent, United States of America for the sum of Seventy-Five Hundred Dollars (\$7,500.00), together with costs herein incurred and

said respondent and libelant should recover nothing against third party respondent Rothschild-International Stevedoring Co., a corporation.

II.

That the action against the Union Sulphur Co., Inc. be dismissed with prejudice and without costs;

Done in Open Court this 25th day of July, 1949.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

/s/ OSCAR A. ZABEL,

Attorney for Libelant.

[Endorsed]: Filed July 25, 1949.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 2261

ALFRED L. DILLON,

Plaintiff,

vs.

UNION SULPHUR CO., INC., a corporation,
Defendant.

In Admiralty, No. 15131

ALFRED L. DILLON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROTHSCHILD-INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Third Party Respondent.

JUDGMENT AND DECREE

The above consolidated cases having come on for trial before the undersigned, judge of the above entitled Court, without a jury on July 23, 1949; libelant being present in person and represented by his attorney, Oscar A. Zabel; respondent, United States of America, being represented by Bogle, Bogle and Gates and Edward S. Franklin, and the third party

respondent, Rothschild International Stevedoring Co., being represented by W. E. DuPuis; opening statements were made by respective counsel, evidence was submitted on behalf of all parties, and closing arguments of respective counsel were heard.

Thereafter, the Court entered herein Findings of Fact and Conclusions of Law, in conformity with which the following judgment is hereby entered:

I.

That the libelant, Alfred L. Dillon, have and recover judgment against the respondent, United States of America, in the sum of \$7,500 and taxable costs expended herein, to be taxed by the Clerk.

II.

That the defendant, Union Sulphur Co., Inc., is dismissed in this action with prejudice and without costs.

III.

That the third party respondent, Rothschild International Stevedoring Co. is dismissed from any liability in this action and that the said third party respondent have and recover from the respondent, the United States of America, its taxable costs herein incurred to be taxed by the Clerk.

Done In Open Court this 25th day of July, 1949.

/s/ JOHN C. BOWEN,

Judge.

Presented By:

/s/ OSCAR A. ZABEL,

Attorney for Libelant.

[Endorsed]: Filed July 25, 1949.

[Title of District Court and Cause.]

In Admiralty, No. 15131

PETITION FOR APPEAL AND
ORDER FOR APPEAL

To the Honorable Above-Entitled Court:

Your petitioner and Respondent United States of America prays that it be allowed to appeal from the final decree entered in this court and cause on July 25, 1949 to the United States Court of Appeal for the Ninth Circuit insofar as said final decree failed to award the United States of America recovery over, in whole or in part, from Rothschild-International Stevedoring Company, a corporation, third party respondent, on account of the judgment and decree entered against your petitioner in the amount of \$7,500.00 and costs in favor of libellant Alfred L. Dillon, which is the only question petitioner desires to review on appeal.

Wherefore, your petitioner prays that its appeal be allowed, and that the usual Apostles on Appeal be sent to the United States Court of Appeals for the Ninth Circuit and that the usual citation issued directed to Rothschild-International Stevedoring Company, third party respondent above named, in order that the decree may be reviewed and modified or reversed as to the said Court of Appeals for the Ninth Circuit may seem just and in accordance with

the Assignment of Errors filed herewith; and your petitioner will ever pray.

Dated this 13th day of October, 1949.

Of Counsel

BOGLE, BOGLE & GATES

/s/ J. CHARLES DENNIS,

U. S. Attorney,

Proctors for Respondent and Petitioner, United States of America.

Upon the foregoing petition,

It Is Ordered that the appeal herein be allowed as prayed for and that Citation on Appeal issue forthwith.

Dated this 14th day of October, 1949.

/s/ JOHN C. BOWEN,

U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 14, 1949.

[Title of District Court and Cause.]

In Admiralty, No. 15131

CITATION ON APPEAL

To: Rothschild-International Stevedoring Company,
and W. E. Du Puis, its Proctor:

Greeting:

Whereas United States of America, petitioner, has lately appealed to the United States Circuit

Court of Appeals for the Ninth Circuit from that portion of the final decree rendered in said cause on July 25, 1949, in said District Court of the United States, for the Western District of Washington, Northern Division, which decree fails to grant petitioner United States of America recovery over, either by way of full indemnity or contribution against Rothschild-International Stevedoring Company, a corporation, third party respondent, against the judgment entered by said final decree against the United States of America in favor of libelant Alfred L. Dillon in the amount of \$7,500.00 and costs; you are therefore, cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit, San Francisco, California, within forty days of the date of said appeal, to show cause, if any there be, why said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given Under My Hand at Seattle, in said district, October 14th, 1949.

[Seal] s/ JOHN C. BOWEN,
 U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 14, 1949.

[Title of District Court and Cause.]

In Admiralty, No. 15131

ASSIGNMENT OF ERRORS

United States of America, respondent and peti-

tioner herein, appealing from the final decree entered in this court and cause on July 25, 1949, makes the following Assignment of Errors:

I.

That the trial court erred in refusing to grant petitioner and respondent United States of America recovery over either by way of full indemnity or contribution against Rothschild-International Stevedoring Company, a corporation, third party respondent, for the amount of judgment and costs decreed against respondent and petitioner in favor of libelant Alfred L. Dillon.

II.

That the trial court erred in entering Findings of Fact and Conclusions of Law and decreeing that third party respondent Rothschild-International Stevedoring Company, a corporation, was entitled to its costs against petitioner and respondent United States of America.

Dated this 14th day of October, 1949.

Of Counsel

BOGLE, BOGLE & GATES

/s/ J. CHARLES DENNIS,

U. S. Attorney,

Proctors for Respondent and Petitioner United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed October 14, 1949.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 15131

ALFRED L. DILLON,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROTHSCHILD-INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Third Party Respondent.

Before: The Honorable John C. Bowen,
District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

June 23, 1949, 11:00 o'clock a.m.

Appearances:

Oscar A. Zabel, of the firm of Zabel, Poth & Paul,
appearing for and on behalf of libelant.

Edward S. Franklin, of the firm of Bogle, Bogle
& Gates, representing J. Charles Dennis, United
States attorney, appearing for and on behalf of
respondent and petitioner United States of America.

W. E. DuPuis, appearing for and on behalf of

third party respondent, Rothschild International Stevedoring Company.

The Court: Are parties and counsel ready to proceed with the trial of Dillon vs. United States of America and the United States of America vs. Rothschild International Stevedoring Company?

Mr. Zabel: Yes, Your Honor.

Mr. DuPuis: Yes, Your Honor.

Mr. Franklin: May I address the Court? At this time the respondent, United States of America, moves that a subsequent action instituted in the case of Alfred Dillon vs. Union Sulphur Company, on the law [2*] side, No. 2261, be consolidated for trial purposes with this action for the reason that the matters in controversy are identical in the subsequent action, which I am asking be consolidated with this action.

It is alleged in this libel that the United States of America was the owner and operator of the Goucher Victory, and that the Union Sulphur Company was merely acting as general agent. For some unknown reason, shortly before this case was set for trial, an independent action was instituted on the law side, Alfred L. Dillon vs. Union Sulphur Company. I think it would conserve the time of the Court and parties if the matters were consolidated.

The Court: What effect will that have on the time of the trial? Will that possibly have as one result a delay in the beginning of the trial?

Mr. Franklin: I do not think so, because the

* Page numbering appearing at bottom of page of original Reporter's Transcript.

question in both cases, if the Court please, is whose negligence was responsible for the accident. In the one action, they say it is the United States, and in another action they say it is the Union Sulphur Company. I make that suggestion to save everybody's time. Of course, the disposition of this case, I presume, may dispose of the second action.

The Court: Mr. Zabel, do you wish on behalf of [3] the liabelant to make any statement?

Mr. Zabel: Do you mean in connection with the matter Mr. Franklin has just raised?

The Court: Yes.

Mr. Zabel: The reason the second action, 2261, was instituted is that it is alleged in this second action that the Union Sulphur Company was the operator of the MS Goucher Victory, a merchant vessel, and that it was under charter of the vessel under an agreement with the United States of America, the exact nature of the agreement being unknown to the plaintiff.

The Court: Mr. Zabel, if you will excuse me for interrupting you, I would rather you would just go to the question of your attitude towards his request that these two actions be joined. I do not need anything else. Do you agree to it or oppose it? If you oppose it, perhaps a statement is needed; otherwise not.

Mr. Zabel: I do not oppose it, because it is true that the issues of negligence and all that are identical.

The Court: That being the case, although Judge

Black has not had an opportunity to offer his consent since I believe he is absent from the district, but if the situation were reversed with respect to him and me, I would expect him to feel authorized to deal with any business pending in the court, and I am sure he would [4] feel disposed to do so if his doing so was deemed appropriate and not objected to by counsel interested, I believe these two actions should be consolidated in the interest of time saving. There is no need of having a trial with one set of litigants and later on having both attorneys and parties and their witnesses called back again. It seems to me that would be a great loss of time.

In view of the request and the attitude of the libelant stated by Mr. Zabel, the Court is of the opinion that the motion should be granted and it is so ordered.

Whereupon, opening statement having been made on behalf of libelant, the following proceedings were had and done, to-wit:

Mr. Franklin: If the Court please, the respondent prior to the actual trial of the case, moves that all witnesses be excluded from the courtroom.

The Court: With the exception of the plaintiff, all witnesses in this case and all persons who may be called as witnesses are excused from the courtroom and will remain in attendance in the anteroom subject to your being called to the witness chair. [5]

The plaintiff and libelant may now call his first witness.

ALFRED L. DILLON

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zabel:

Q. What is your name?

A. Alfred Larry Dillon.

Q. You are the libelant and plaintiff in these consolidated cases? A. Yes, sir.

Q. Are you a resident of Seattle, King County, Washington? A. Yes, sir.

Q. What was your age under date of May 13, 1946? A. 56 years old.

Q. Are you married? A. A widower.

Q. What is your occupation?

A. Stevedore.

Q. And how long have you been in that occupation? [6] A. For 33 years.

Q. Have you been in that occupation in this city during that period of time?

A. 27 years in the city of Seattle.

Q. On or about May 13, 1946, by whom were you employed?

A. By the International Rothschild Stevedoring Company.

Q. As a stevedore? A. Yes, sir.

Q. On that date when did you commence your shift?

A. At 6:00 o'clock at night on May 13th.

(Testimony of Alfred L. Dillon.)

Q. What ship were you working on?

A. The Goucher Victory.

Q. And where was that located?

A. At Pier 38 on the north side.

Q. What work were you hired to do on that date?

A. As a stevedore.

Q. On the ship? A. Yes, sir.

Q. How many were there in your gang?

A. There was eight men and two deck men, and two dock men, that is the sling up men.

Q. Where were the eight men that you speak of working?

A. There was four on the port side and four on the [7] starboard side.

Q. And they were stowing cargo?

A. Yes, sir.

Q. What side were you working on?

A. I was working on the port side.

The Court: Four of the eight were on the starboard side and four of the eight on the port side?

The Witness: Yes, sir.

The Court: What deck?

The Witness: The lower deck, that is the lower tween deck it is called.

Q. Was there a hatch tender? A. Yes, sir.

Q. Where was he?

A. Up on deck, up on the poopdeck.

Q. That is the top deck?

A. That is the top deck, yes.

Q. And the winch driver?

(Testimony of Alfred L. Dillon.)

A. The winch driver was at the winches, back from the hatch.

Q. Do you know what kind of winches they were?

A. Electric winches.

Q. Who was the winch driver?

A. It was Paul Rigney.

Q. Who was the hatch tender? [8]

A. Snellman, I call him Snell.

Q. S-n-e-l-l-m-a-n? A. Yes, sir.

The Court: At this time, ask him what the number of the hatch was.

Q. What was the number of the hatch?

A. No. 1 hatch.

Q. And the type of goods which were being stored in this ship?

A. It was what you call general stores, that is everything, sacks of potatoes, cans of milk and so forth. It is general stores, that is what they call it.

Q. What had you done right after you went on duty at 6:00 o'clock in the ship?

A. We went down in the lower hold and started right in with the freight, with the general stores, and loaded.

Q. In the lower hold? A. Yes, sir.

Q. Right at the bottom of the ship?

A. Yes, sir.

Q. And these loads were brought from where?

A. From the dock.

Q. And they were placed in the lower hold? Just tell the maneuvers that are made to bring the load from the dock into the hold? [9]

(Testimony of Alfred L. Dillon.)

A. If you will excuse me, I will get down on the floor and I can explain that better to you.

The Court: If he would like to do that, it is agreeable to the Court if there is no objection.

Mr. Franklin: No objection.

The Court: You may do that.

Q. I am just talking about the load.

A. Here is the load, it comes over the ship and over the coamings, that is what you call the top hatch coamings. The load came over and then she came down and when she came down, she lands on what we call a skin, just like a floor like this. We call it a skin on the waterfront.

Q. That is the lower hold?

A. That is as far as you can go. Then on the starboard side there is what you call lockers. On the port side that locker was filled up, but forward, in the forward end of the ship, there is a big locker and that is where we were putting the stores, in these two lockers, one on the starboard side and one on the forward.

Q. When that is brought in, is the hatch tender in view?

A. The hatch tender is in view all the time of the hatch.

Q. And he watches the loading?

A. He watches all the maneuvers that is going on. [10]

Q. And gives the signals to the winch driver?

A. Yes, he has got to.

(Testimony of Alfred L. Dillon.)

Q. Then the loads are let down into the lower hold and then they are placed by you, is that right?

A. That's right.

Q. You had finished loading that, had you, while you were still on duty in the lower hold?

A. Yes, while I was on duty.

Q. The lower hold? A. Yes.

Q. And then following the completion of that job of storing in the lower hold, what was the next operation?

A. The next operation was to put the beam in, the strongback.

Q. The beam or the strongback?

A. Strongback, that is the proper name for it.

Q. Can you explain to the court what the strongback is and what it is intended for?

A. Well, the hatch was about twelve feet square, and there is a strongback goes across like this (indicating). When you get that in place, you put the hatches on there and that is the same as a floor.

Q. This strongback is in one piece, is it?

A. One piece, yes.

The Court: Where is it with reference to the center of the hatch?

The Witness: In the center of the hatch, Your Honor.

The Court: Does it extend fore and aft or athwartship?

The Witness: Athwartship, Your Honor.

Q. How is it fitted into the hatch?

(Testimony of Alfred L. Dillon.)

A. It fits into the slots. There is a slot on each side, port and starboard slot.

Q. When it is fitted in there, then it is secure, is it? A. It is secure, solid.

Q. Is there more than one beam in the hatch?

A. There is just the one beam in this hatch, two sections of hatches.

The Court: Those hatches are what material?

The Witness: Wood.

The Court: How would you describe the pieces of wood that constitute the hatches?

The Witness: They are about two and a half inches thick, and varies from two feet to three feet wide.

The Court: That would not be one solid board, would it?

The Witness: No, sir. There is several hatches, you see, to go on. [12]

Q. And this beam, is that of wood or is that of other material? A. Steel beam.

Q. With reference to weight, have you any idea of the weight of that beam?

A. It varies from the weights, because a very light beam in the lower hold, and they vary from four, five, six, seven, way up to eighteen hundred pounds. That is the top deck.

Mr. Franklin: We move the answer be stricken as not responsive. The question was how much did this beam weigh.

The Court: State how much this beam weighed, if you know.

(Testimony of Alfred L. Dillon.)

The Witness: It is hard to say if you haven't got the scales or anything. I wouldn't like to judge the weight.

Q. Can you estimate it?

A. I should judge between 400 and 500 pounds of my own knowledge.

Q. As you go higher up the beams get bigger, do they?

A. Oh yes, the stronger the beams are.

Q. Sir?

A. The stresses are way up high.

Q. On this date while on duty, were you in the act of 13 guiding a beam or strongback tween decks?

A. The lower hold, yes I was.

The Court: Do you mean this so-called tween decks that you have referred to, by the lower hold?

The Witness: That is by the lower hold, yes, sir.

Q. The lower part of the ship was already loaded, wasn't it?

A. Yes.

Q. How would you describe this? This beam was then the next layer?

A. That is right.

The Court: "Layer" does not describe anything, Mr. Zabel.

Q. How far below the main deck was this beam, would you say?

A. You see, from the main deck—now, there is a poopdeck——

Q. The top deck?

A. That is the poopdeck.

(Testimony of Alfred L. Dillon.)

Q. From there?

A. I should judge that was about close to 20 feet. That is a guess, I don't know because you don't measure that stuff.

Q. How would you describe the particular location where this beam was? [14]

The Court: With reference to what deck it was.

Q. With reference to the lower hold?

A. You mean when I was landing it?

Q. Yes.

The Court: No. It may be that counsel understands this, but I do not. As I understand it, there is some cargo space in the farthest space down?

The Witness: That is right, Your Honor.

The Court: Had that space been filled?

The Witness: Yes, sir.

The Court: Where is the next space available?

The Witness: It is on the next deck.

The Court: Is there a deck next above that lowest available cargo space?

The Witness: When you come out of the lower hold.

The Court: You should answer the question directly, so that the record would show what your answer is.

The Witness: When you come out of the lower hold, and you come to cover up, that is the next deck.

The Court: With reference to this place where the accident occurred, what has the next deck to do with it, if anything?

(Testimony of Alfred L. Dillon.)

The Witness: This would be on what you call the lower between deck.

Q. The lower tween deck, is that right? [15]

The Court: Where is that with reference to this cargo space that is lowest down in the ship?

The Witness: It is just above it.

The Court: It is the deck next above the lowest possible cargo space?

The Witness: That is right.

The Court: You refer to that as the lower hold, do you not?

The Witness: Yes, Your Honor. .

The Court: Is it a fact that you mean what some people call the lower tween deck?

The Witness: Well, I guess I do.

The Court: Do what you can to see if you can locate the place where the accident occurred.

Q. Where you were working, was that the lower tween deck, with the strongback?

A. With this beam at that time, it was what you would call the lower tween deck.

The Court: Where is it with reference to the deck next above the lowest possible available cargo space? How many decks were there between that and the cargo space that was the lowest space in the ship available for cargo?

The Witness: None. You had to come up on this deck. That is the only deck. [16]

The Court: Were there any other decks between the space lowest in the ship available for cargo

(Testimony of Alfred L. Dillon.)

and this deck where the accident happened?

The Witness: That was on the same—

The Court: Try to find out from this witness if he knows how to describe the deck the accident occurred on and how many decks there were between that and the lowest available cargo space.

Q. You had loaded the lowest available cargo space, hadn't you? A. Yes, sir.

Q. Where you were placing the strongback, was that the next deck?

A. The next deck, that's right.

The Court: The next below it or the next above?

The Witness: Above.

Q. The next above, is that right. A. Yes.

Q. And there was no other deck in between them? A. No other deck in between them.

The Court: You gave all the names by which you or other men working with you ever do refer to that deck?

The Witness: That is the names that we give them, yes, Your Honor. [17]

The Court: I want you to give all the names by which that deck is known to you or other men whom you heard mention it by name.

The Witness: We generally call it the lower between decks on the ship.

The Court: You sometimes today have said "lower deck," haven't you, without using the words "between decks"?

(Testimony of Alfred L. Dillon.)

The Witness: I did once, Your Honor.

The Court: May it be understood that when you say lower deck or lower between decks, that you are referring to this deck on which this accident happened?

The Witness: That's right, Your Honor.

Q. With reference to the strongback and its loading, just state where the strongback is taken from?

A. The strongback is taken from the top deck, that is what we call the poopdeck. That is not the main deck, but the poopdeck.

Q. How is it taken?

A. By the electric winches.

Q. How is it attached? A. By spreaders.

Q. How many spreaders?

A. One set of spreaders, that is what they call it.

Q. One set of spreaders. Just explain to the Court [18] what they are?

A. They are wire ropes, and there is a hook on it, on the end for the hook ends of the beam.

Q. On each end of the beam? A. Yes.

Q. Attached to these spreaders, what is the next segment before it is attached to the apparatus, that is the strongback down there?

A. The spreaders is made with a ring, and it is hooked on to what you call the hook, and then it goes like that with the hook on. Then it is lifted up and then it comes over the top hatch.

The Court: What does it come over to?

(Testimony of Alfred L. Dillon.)

The Witness: It comes over the top hatch and then down.

The Court: Where does it come from in the coming over process?

The Witness: From the top deck, the poopdeck.

The Court: Where does it come from on the top deck?

The Witness: The strongback?

The Court: The spreaders are attached to what?

The Witness: You hook them on to the strongback.

The Court: You have just been describing the spreaders. We are going away from the spreaders to the [19] to the other end of whatever it is that handles the spreaders.

The Witness: Well, the only way I can explain it is that the spreaders is hooked onto the cargo hook.

The Court: Then what is hooked on to the cargo hook?

The Witness: The spreaders.

The Court: What else above the spreaders?

The Witness: Nothing else above the spreaders.

The Court: How do you lift it?

The Witness: The falls.

The Court: The lower end of the falls is attached to the cargo hook, is that right?

The Witness: That's right.

The Court: To what are the other ends of the falls attached?

(Testimony of Alfred L. Dillon.)

The Witness: To the winches.

The Court: What do you call the part of the winch to which the——

The Witness: The drum.

Q. How many falls do you have?

A. You have two falls.

Q. What are they described as?

A. They are described as the yard arm and the midship arm. [20]

Q. The two of them? A. That is right.

The Court: The witness may resume the witness chair.

(Witness returns to witness chair.)

Q. Just state the course of the strongback from the time it left the poopdeck until it was brought into the hold of the ship.

A. How long it takes it?

Q. Just tell the course of it.

A. It came over the top coamings, and then it came down.

Q. During that time, was there a hatch tender there? A. Yes.

Q. What did the hatch tender do?

A. Well, I seen the hatch tender give the signal to come down a little.

Q. How does he give those signals, this particular hatch tender I am talking about?

A. He gives signals like this, and then he will put his arm like that (indicating) to stop. When he wants it to come back any more, he goes like this

(Testimony of Alfred L. Dillon.)

(indicating) with his fingers. That is, slow down.

Q. When you say come back any more, you mean let it down? [21]

A. That's right, if I say come back, but I didn't say come back. He just brought it down so far, so I could get hold of it to put it into the slot.

Q. Now I will ask you what time of the evening was it that you were placing this strongback in the tween deck hold?

A. It was about 9:30 at night.

Q. 9:30 p.m.? A. Yes.

Q. Just tell the Court your experience in connection with that operation.

A. I was engaged at the end of the beam to bring it from about a couple of feet from where it was hanging over to the slot, and when I got set in the slot, she just come right down on to my hand. She just came like that, quick, there was no signal whatsoever.

Mr. Franklin: I move that the answer be stricken. It is not responsive.

Mr. Zabel: Do you mean the last portion?

Mr. Franklin: Yes.

The Court: The last statement of the witness will be stricken as not responsive, "there was no signal given."

Q. About how far was the strongback above the slot at the time it dropped on your hand?

A. Well, it was between two or two and a half feet, [22] I should say.

(Testimony of Alfred L. Dillon.)

Q. Can you explain to the Court in a little more detail just how that happened and what you were doing prior to the time it fell on your hand?

A. Well, we will say that is the beam——

Q. Do you have a pencil there?

A. We will say this pencil is the beam. There is a slot here and there is a slot here (indicating), where that beam has got to go in. The spreaders is on like that, one that way and one this way (indicating), then the cargo hook and the falls from your winch. I was engaged on the port side and I was pulling this beam towards the slot. I had hold of the spreaders like this and like that (indicating) and then when he gets it over there, there was no signal to come back at all, and down she come and caught me. She pulled me right on to my knees and pulled my shoulder at the same time.

Q. You had an illustration drawn here of the way the beam appeared?

A. Yes, but there is just a little mistake on that. That midship fall should be straight up and down.

Q. It is not accurate as to distance, is it?

A. No, it is not accurate.

Q. It is entirely explanatory?

Mr. Franklin: With the Court's permission, might [23] I ask counsel who drew it?

The Court: You may do so.

The Witness: I got a little school boy to draw it for me.

Q. Under your direction?

(Testimony of Alfred L. Dillon.)

A. Yes, it was under my direction.

Q. You drew it as illustrative of the appearance of the strongback and the spreaders?

A. I went like this, draw a straight line and a ring here and the beam here.

Mr. Franklin: We have no objection if it is offered just for illustration.

The Court: You might ask him specifically if he thinks that fairly characterizes and explains his statements as to how the attachments were placed and how the accident happened.

Q. I will ask you if that illustrates and fairly represents the portion of your description of the accident as to how it happened and the type of strongback involved and the spreaders and the yard and port arm? A. You mean the midship?

Q. You called it the midship arm?

A. The midship fall.

Q. I want you to answer the question, does that fairly represent the situation there? [24]

A. Well, not exactly, no. The midship fall should be a little straighter up.

Q. A little straighter?

A. Yes, like that (indicating).

Q. And you have it on a slant?

A. It is on a slant, yes.

Q. You are talking about the midship fall?

A. The midship fall, that is on the port side.

Q. The starboard fall is about right?

A. The starboard fall is what you call the yard arm. That is just about right.

(Testimony of Alfred L. Dillon.)

Q. Will you show the Court—

The Court: You do not have to show me. I want to hear what he has to say. I will look at it later.

Q. Can you demonstrate to the Court just how you were placing this strongback in the slot and how it happened?

The Court: Mr. Zabel, I understood you were trying to clear this offered exhibit.

Mr. Zabel: In other words, I can offer the exhibit merely for illustrative purposes?

Mr. Franklin: No objection.

Mr. Zabel: I will offer it in evidence then.

The Court: Let it be marked Libelant's Exhibit 1, and the same is now admitted in evidence. [25]

(Diagrams marked Libelant's Exhibit 1 for identification.)

(Libelant's Exhibit 1 received in evidence.)

Q. Will you demonstrate to the Court just how this accident happened? With the Court's permission, I would like to have the plaintiff come forward.

The Court: He may do that.

Q. Just tell the Court about this accident, give the details.

A. The strongback came over the coaming, and way down until it got so far. When he got so far, he stopped and that is when you get hold, but it swung a little and we steadied it and I had this hand on the spreader here and I couldn't get it loose, so I was pulling this over to the slot. When I got to

(Testimony of Alfred L. Dillon.)

the slot, she just went right down and drewed me down with it, and that is when it dropped away from the spreaders.

Q. Is that the customary action?

A. No, it is not.

Q. Of lowering that strongback into the slot?

A. No, it is not.

Q. How is it customarily and properly brought up?

A. Customarily, you get it over there to the slot. I will say come back just a little, come back, come back, [26] and she goes in.

Q. Would your hand have been smashed had it been brought down in that manner?

Mr. Franklin: That is objectionable, if the Court please.

The Witness: No, it would not.

The Court: The objection is overruled. The Court will hear it.

Q. Were you able to extricate your hand from that slot and strongback?

A. No, sir, I wasn't.

Q. Just tell what immediately transpired afterwards.

A. I was held there for three or four minutes and then the boss came down.

Q. Who was the boss?

A. I don't know his first name, but I have known him ever since I came on the waterfront. His name is Petri.

Q. He was known as the foreman?

(Testimony of Alfred L. Dillon.)

A. Yes, sir, of the Rothschild Company.

Q. Was he there at the time you were hurt?

A. No, he wasn't. He came down after it was jammed in, and he came down and looked at the beam. I says, "Will you get this beam up?" and he says, "Just a minute, Dillon, I will [27] go up."

He went up two flights of steps and talked to the hatch tender and winch driver and come running down and say, "Just a minute, I will get it up." I was facing down like this (indicating) and now he says, "Lift her up, boys" so the hatch tender give him a slight signal, just like this (indicating) "Take it as easy as you can" and when it came up, it came up just like that and I had to shove it away with my hand, and I was held there for about three or four minutes.

The Court: By that, do you mean for three or four minutes?

The Witness: The beam was rested on my hand, held there.

The Court: All those connected with this case may be excused until 1:30 this afternoon.

(At 12:10 o'clock p.m., Thursday, June 23, 1949, proceedings recessed until 1:30 o'clock p.m., Thursday, June 23, 1949.)

ALFRED L. DILLON

Direct Examination (Continued)

By Mr. Zabel:

Q. Mr. Dillon, I believe you have reached the

(Testimony of Alfred L. Dillon.)

point where you were caught between the strongback and the slot? A. Yes, sir.

Q. They raised the strongback off your hand?

A. They raised the strongback by the electric winches [69] four minutes after. I was held there for four minutes.

Q. And then after it was raised, who did you see or talk to?

A. Well, I talked to Petri to get me to the doctor quick, and he took me to the Army doctor on the ship. The Army doctor says, "I will snap the fingers off for you." I says, "No, no, we've got doctors," just like that.

Q. Did you go up on top the deck?

A. I went up on top, on deck, yes.

Q. Who did you see there?

A. We went to midship of the ship. I seen the Army doctor.

Q. I mean, did you see any of the crew there?

A. No, I did not.

Q. Did you see the winch driver?

A. I seen the winch driver, yes.

Q. Where did you see him, down below, or on the deck?

A. The winch driver was standing at his post right between the winches.

Q. Did you have any conversation right then?

A. Yes. I told him, "Look here what I got." He said, "Can I help it? It slipped."

(Testimony of Alfred L. Dillon.)

Mr. Franklin: We object to this upon the ground that it is hearsay. It is self-serving.

Mr. Zabel: It is part of the *res gestae*. [70]

The Court: Have you any case that holds that it is part of the *res gestae*, something of that sort after he left the hold of the ship?

Mr. Zabel: I don't have any case here at present, Your Honor.

The Court: Do not ask any question until you get the case. Counsel may feel that the trial judge should know the law on a question like that, but we try a great many cases day in and day out, and I would like to be reminded of your authority upon which you claim that right.

We all know that formerly that sort of situation was not part of the *res gestae*. It is a question of whether modern cases have changed that or not. I can see how you might argue that that speaker had not had a chance to realize the accident before this man came up and confronted him with the appearance of his hand, or something like that, but it is all argument, and I do not think the law originally included that kind of an occurrence in the *res gestae*. Perhaps modern decisions do. I should have the benefit of them if there are any such, so go to some other subject until you get some law.

Q. You say you then went to the Army doctor?

A. The Army doctor right on the ship, in mid-ship. [71] They have got a little hospital there right on the ship.

(Testimony of Alfred L. Dillon.)

Q. What was done there?

A. Well, they give me a shot of morphine, and he says, "We are going to snap the fingers off," and I says, "Hold on, we've got doctors." After he give me the morphine, he took the hand and dressed it up, and quarter to ten I got off the ship and went up to the hospital. It was 11:30 at the hospital before Dr. Smith came.

Q. What was done there?

A. They put me to sleep and operated on the fingers.

The Court: What is the first name of Dr. Smith?

The Witness: Edmund Smith.

Q. What is his office?

A. Medical Art Building.

The Court: On what street?

The Witness: Seneca.

The Court: On what north or south street?

The Witness: It is on the west side of the street, the Medical Art Building.

The Court: Which street is it on the west side of?

The Witness: Second Avenue.

The Court: You may examine.

Q. So Dr. Smith came, and you say they put you to sleep and treated you? [72]

A. Yes.

Q. Did they perform any surgery?

(Testimony of Alfred L. Dillon.)

A. I guess they did. You see, I was put off to sleep. I didn't know what they were doing.

Q. What was the condition of your right hand when you woke up?

A. The condition was, it was all splinted up and all bandaged up.

Q. Where did that run? A. What?

Q. From what point to what point did it run?

A. You mean the splints? It came from here (indicating) right down to the fingers, and sticking over like that.

Q. From the elbow?

A. No, below the elbow.

Q. Right below the elbow to the fingertips?

A. Yes.

Q. How long did you carry your arm in that splint?

A. For about two and a half to three months.

Q. How long were you in the hospital?

A. I was eight days in the hospital.

Q. What hospital?

A. Seattle General.

Q. Who removed the splint?

A. Dr. Smith. [73]

Q. Following that time, what was the condition of your arm and hand?

A. It was kind of raw.

Q. At that time, just tell the Court what was the condition of your arm, hand and shoulder?

A. I complained about my shoulder and he

(Testimony of Alfred L. Dillon.)

tapped me on the left shoulder and says, "That will be all right."

Q. What shoulder did you complain about?

A. About my right shoulder being pulled.

The Court: How long did you say your hand and wrist remained in the splints that were put on when you were in the hospital?

The Witness: Two and a half to three months.

Q. Following that time, did you have any treatment?

A. Yes. I used to go to Dr. Smith twice a week, then he would say, "Come next week, then twice next week," and that was right through until the insurance cut me off, with massages, heat and one thing and another.

Q. What kind of treatment did they give you during that period of time? A. Dr. Smith?

Q. Yes.

A. Dr. Smith used to get hold of the fingers and twist them and try to work them and then he would bandage them up. [74]

Q. Was that the treatment he gave you?

A. That is the treatment.

Q. Did he give you any medicine or anything like that?

A. Yes, I had about \$20 worth of medicine, I guess.

The Court: What was that, a tonic for your general system?

The Witness: I don't know what they called

(Testimony of Alfred L. Dillon.)

it, Your Honor, but it was a white bottle. It was like—I couldn't explain what it was, and I had to take two teaspoons full every day.

The Court: Do you know what it was for, what condition it was supposed to be for?

The Witness: I do not. I used to take capsules, pills.

The Court: It does not appear to me why one with broken fingers needs medicine inside his body.

The Witness: I can give you a description of what it was for as far as he told me, it was for to strengthen the bones of the arm, but the name of the medicine I do not know.

The Court: Do you think they called it calcium or anything like that?

The Witness: It was like calcium, yes, the color of it. [75]

Q. How long were you treated by Dr. Smith for this condition?

A. I was treated for about nine months.

Q. During this period of nine months, what was the condition of your arm and hand and shoulder?

A. The shoulder was painful. I complained to him and he said, "That will come back, that is all right." He had a brace from the wrist here up to here (indicating) with elastic bands on, and I used to pull them up tight, to pull the fingers around, and I could never get them any farther than what they are at the present date (indicating).

(Testimony of Alfred L. Dillon.)

Q. After the nine months' treatment, did you have any further treatment for your arm and hand?

A. Well, just as I could afford to pay for myself.

Q. What type of treatment did you have after that time?

A. Well, I used to get massage in the whirlpool, as they call it, and one thing and another, and twisting of my fingers to see if I could get them working, to be pliable.

Q. Have you had any recent treatment?

A. Not until these doctors.

Q. You have not had any treatment?

A. No, I haven't.

Q. Has the condition of your hand and arm changed any [76] in the last year?

A. No, it hasn't. It is the same way, been the same way since the accident.

Q. It is the same way since the accident?

A. Yes, sir.

Q. Just explain to the Court what trouble you have today with your right hand and arm?

A. The trouble?

Q. Yes.

A. Well, the trouble is that I get that pain from a cord here that runs all the way down the shoulder to the elbow. That is as far as I can feel it, and then this back, this shoulder, they call it a muscle or something like that, that goes down the shoulder way down into here.

(Testimony of Alfred L. Dillon.)

Q. Show the Court how high you can raise your right arm. Will you take off your coat?

A. Sure, I will take off my coat.

Q. Can you roll up your sleeve?

A. Do you want the shirt off?

The Court: You need not take your shirt off.

Q. Just roll up your sleeve. Show the Court how high you can raise your hand at the present time. A. That's it (indicating).

Q. Are you trying hard?

A. Oh, sure. You can come here yourself and pull it [77] up if you can.

Q. Raise your left arm. Could you raise your right arm the same as your left arm before this accident? A. Sure.

Q. Straighten your right arm out as far as you can. Are you trying to straighten it out?

A. I am.

Q. Now, straighten out your left arm. Before this accident, could you straighten your right arm the same as your left arm?

A. Yes, sure, perfect.

Q. With reference to your hand, open your right hand as far as you can.

A. Come on over here and try it. I can't. Anybody in the courthouse can come over and try it. I can't. I can take it like that (indicating) and it won't go down. I can take it and push it that way and it won't go down. Anybody can try it.

Q. Now grip your right hand.

(Testimony of Alfred L. Dillon.)

A. I can't grip. There you are, that is as far as I can grip it, just like a rock.

Q. Can you bend your fingers in your right hand?

A. No. There you are, that is as far as I can get them. It is pulling in here to beat the band.

Q. Has it been that way since the accident?

A. Yes.

Q. Was your hand and arm in that condition before this accident? A. No.

The Court: How long after the accident did it get in that condition?

The Witness: It was right after they took the splints off.

The Court: Has the condition of hardness of the fingers that now seems to be present in them increased in the last year or fifteen or eighteen months?

The Witness: It will be a slight increase if it was. It was like this when they took the splint off, just started right off like that.

The Court: Have the muscles above and around your wrist been growing hard like the tissues in your fingers?

The Witness: Yes, up in here it gets hard when you try to do anything. When you try to straighten it out, it gets firm.

The Court: Did any doctor ever tell you that your flesh was turning to bone?

The Witness: No, sir.

(Testimony of Alfred L. Dillon.)

The Court: No one has ever told you that?

The Witness: No, sir. [79]

Q. Is there a difference in the appearance of your right hand over your left hand as far as the smoothness of it is concerned?

A. You can see which way she swells up, like that, every day and every night she swells up.

Q. I mean the skin, is the skin of your right hand any different from the left?

A. You see, I can't feel this hand.

The Court: The appearance of the skin?

The Witness: Oh, yes, there is a little appearance.

Q. What is the difference?

A. It is a little darker, I guess.

Q. It is shiny, isn't it?

A. It is shiny, yes, down here.

Q. Up to the date of this accident, did you work quite steady?

A. Oh, yes, I worked steady for the Rothschild, loading and piling, and that is a dangerous job on the waterfront. I worked there years for them, and for Griffith & Sprague, all stevedoring companies on the waterfront.

Q. Did you have any illnesses of any kind during your last 25 years?

A. No illnesses at all. [80]

Q. Or any injuries?

A. Slight injuries, yes.

(Testimony of Alfred L. Dillon.)

Q. Did you have any injuries to your right arm, right hand or shoulder?

A. None at all, whatsoever, either hand.

The Court: How many times during five years before the accident had you been to see a doctor about your health?

The Witness: In five years, I was once.

The Court: Before that, had you been to see a doctor very often about your health?

The Witness: Just once in the five years.

The Court: Prior to the five-year period, do you remember any period prior to that when you had any sickness or physical injuries of any sort when you consulted a doctor?

The Witness: Yes, on a slight injury I had Dr. Smith again.

The Court: How long before this accident?

The Witness: That was in 1942, I think.

The Court: What kind of an injury did you get at that time?

The Witness: That time I got a bruise here (indicating) on the left side.

The Court: On your chest? [81]

The Witness: Yes, sir.

The Court: Did you ever have any bones broken before these bones in your right hand were broken?

The Witness: No.

The Court: When you were a young fellow, did you ever have any sickness of any sort?

(Testimony of Alfred L. Dillon.)

The Witness: Not that I know of, Your Honor.

The Court: Where did you live when you were in your youth?

The Witness: I lived in New York, Long Island, where I was brought up at.

The Court: Were you born there?

The Witness: Yes, sir.

The Court: Did anybody in your family to your knowledge ever have a disease where the flesh turned to bone?

The Witness: Not that I know of. My mother and father died when I was five years old and my brother died about seven or eight years ago and my sister died about six years ago. I am the only one left in the Dillon family.

Q. Your brother was a fighter, wasn't he?

A. Yes.

Q. What was his name?

A. Jack. [82]

Q. A fighter, a boxer?

A. What has that got to do with it?

The Court: I am trying to find out some explanation or some information about your appearance of general debility. How long has it been since you worked?

The Witness: It has been three years, one month and ten days to the day since I worked.

The Court: A person without work for that length of time must have gotten a lot of rest. His body must have received a lot of rest and relaxation during that time.

(Testimony of Alfred L. Dillon.)

The Witness: I have actually tried to water the lawn and one thing and another. You don't call that work for anybody.

The Court: You do not have the appearance of one whose body has been at rest for three years and not been working, or whose body has not been under strain or stress of labor. Can you account for that in any way from the fact that you do not appear to be robust in health?

The Witness: I am in perfect health.

The Court: Do you eat regularly?

The Witness: Oh, yes.

The Court: Do you enjoy your food? [83]

The Witness: Sure.

The Court: Do you have any indigestion?

The Witness: No, sir, no indigestion at all. My landlady and landlord is right in here and I eat with them regularly. They are sitting right over there.

The Court: During your life, have you eaten most of your food downtown or have you had food prepared for you especially?

The Witness: I have eaten with these people for 22 years.

The Court: At their family table?

The Witness: Yes, sir. Not regularly, when I was working I couldn't eat there.

The Court: But generally speaking, when you were not kept away from home by work, you had your food in their home?

The Witness: That is right, for 22 years.

Q. Have you been able to work since you were

(Testimony of Alfred L. Dillon.)

injured at the work you did before this accident?

A. No, I haven't because my job is a peculiar job. Anybody can tell you what a piling job is. The reason I got called on this job was because they were short of a man and I says, "All right, I'll take it."

Q. How much education did you have?

A. Seventh grade, not very much. [84]

Q. Do you know any other kind of work other than stevedoring or longshoring?

A. Yes, I went to school for an engineer, mining engineer, but a man at my age now couldn't get no place in that. They are looking for your diploma from college, a mining engineer from college and I am too old for that.

Q. Do you think you qualify as a mining engineer?

A. No, I couldn't.

Q. You have never had any experience in mines, have you?

A. Yes.

Q. You worked in mines?

A. Yes.

Q. What kind of work did you do?

A. Gold mining.

Q. Would you be able to do that work now?

A. No. Where am I going to work a transit or a level with a hand like this? You have to turn them little screws or else you don't get it right on the lines. I quit the mines and went on the waterfront.

Q. What?

A. I quit mining and went on the waterfront.

(Testimony of Alfred L. Dillon.)

Q. What was your average earning capacity prior to the time you were injured?

A. I don't know. I have got a little thing here, perhaps that will settle it. Do you want to read this?

The Court: He might want to ask you questions and you might want to refer to that before you can make a definite answer.

Q. Prior to the time you were injured, you were working, were you not? A. No.

Q. Before you were injured?

A. Oh, yes, before.

Q. And how much a month were you making?

A. Well, here——

Q. Just answer the question first, if you can.

A. Well, I have made as high as \$500 a month on the waterfront.

Q. On certain months?

A. Yes, it varies.

Q. On the average, what would you say?

A. Between \$300 and \$400 a month.

Q. That is your earning capacity?

A. Yes, here is the capacity right here, \$1083.37 for two months' work, 57 days' work.

Q. For what year was that?

A. That was for 1946.

Q. That was the year you were injured?

A. Yes. If it came to that, I have had as high as [86] three and a half dollars an hour on the waterfront.

Mr. Zabel: You may examine.

(Testimony of Alfred L. Dillon.)

Cross-Examination

By Mr. Franklin:

Q. How long have you been down in No. 1 hatch on the evening of your accident, approximately?

A. Approximately, we went down there—it was 6:00 o'clock when we left the poopdeck to go down and we got down there about two minutes after six and from then on to 9:30 when this accident happened. They cut me off right at this accident, that was at 9:30. They cut me right off.

Q. You had been working then approximately three and a half hours? A. Yes, sir.

Q. Who was the winch driver?

A. The winch driver was Paul Rigney.

Q. What is his true name?

A. It isn't Rip O'Day. That is his nickname and Rigney is his name.

Q. And Snellman was that hatch tender on the deck? A. Yes, sir.

Q. This is a No. 1 hatch, is it not?

A. No. 1.

Q. That is on the forecastle? [87]

A. No, poopdeck.

Q. It is a smaller hatch than the other hatches?

A. Yes.

Q. And you were stowing food supplies, weren't you? A. That is right, general stores.

Q. Mr. Dillon, the Goucher Victory was a troop transport, wasn't she, or do you know?

(Testimony of Alfred L. Dillon.)

A. There was an Army doctor on there. I don't know if she was a troop ship or not but she was at the Army dock.

Q. During that period of time of three and a half hours, the winch leading into No. 1 hatch to your knowledge functioned perfectly?

A. No, sir.

Q. It did not? A. No.

Q. In what way did it not?

A. I couldn't tell you that because I was down below but I told them to get somebody to fix the winches.

Q. Don't tell us what you told somebody else, but of your own knowledge what was wrong with them?

A. How should I know when I was down below, but I could see that the winches wasn't going in right.

Q. I am not trying to trap you or argue with you. If you don't understand what I say, I will ask the question again. So sofar as you yourself know, there was nothing [88] wrong with those winches from your own knowledge prior to the time of the accident?

A. Yes, I do know there was something wrong to my own knowledge, yes.

Q. What was it then?

A. Well, I'll tell you. The loads would come in and when he come to stop, she would just do it.

Q. How frequently did that occur?

(Testimony of Alfred L. Dillon.)

A. It occurred quite a few loads.

Q. How many loads would you say?

A. I couldn't say now.

Q. Did you ever report that condition yourself to anybody?

A. Yes. I hollered up, I says, "Why don't you get somebody to them winches and fix them?"

Q. From where you were working, you couldn't see what went on on deck? A. No, sir.

Q. This No. 1 hatch tween decks is roughly about how wide and how long?

A. How wide, you mean from the side of the ship to the side?

Q. Yes.

A. From the sweatboards to the sweatboards, is that what you mean? [89]

Q. Yes, 12 by 15 or what?

A. Now wait, I think from the sweatboard on the port side to the starboard side would be about 18 or 19 feet. Of course, we didn't measure it. That is just guessing at this because when you are working, you have got no time to measure.

Q. Immediately before your accident, you had completed loading the lower tween decks and you were going to cover up?

A. That's right.

Q. And they sent a strongback from up above?

A. From the poopdeck over and then down.

Q. And as you described, that was hanging on a set of spreaders?

(Testimony of Alfred L. Dillon.)

A. Sure, you have got to have the spreaders or else they couldn't put it there.

Q. Who lowered that down to you, the winch driver?
A. The winch driver, by signal.

Q. Where was that to be placed? What portion of the hatch was that strongback to be placed?

A. Well, I couldn't exactly say, but——

Q. Was it in the center or——

A. Now, wait, I will explain this to you. We will say here is the hatch, you understand, from here to there. Well, that is directly—I think it would be about the [90] center.

Q. About the center?
A. Yes.

Q. And that beam was to be placed athwartship?

A. That's right, it runs across.

Q. Was it a king beam?

A. A K beam.

Q. Why do you call it a king beam? What is the difference between a king beam and a queen beam?

A. That's right, a base comes up about the height of the hatch, right in the center of it and you put the hatches against that, and they can't slip off and that is what you call a K beam.

Q. In other words, isn't it true that there is an extra flange along the top of the beam that they call a king beam in which the hatch covers——

A. Rest on, yes, on both sides.

Q. This was a king beam?
A. Yes.

Q. When it was lowered down, with what speed was it lowered?

(Testimony of Alfred L. Dillon.)

A. Very slow speed until she was stopped.

Q. At the time it was lowered, who was watching the descent of this strongback into the hatch?

A. The hatch tender was right over the hatch like [91] this, giving signals.

Q. Did the winches stop at any time prior to your accident? A. What?

Q. What type of winches were these?

A. Electric winches.

Q. Did the load stop, or was the power turned off at any time before your accident?

A. Well, she was at a standstill, the strongback was at a standstill until we guided it into the slot.

Q. My question was, when it was lowered down, you testified about three feet above the hatch?

A. Two and a half to three feet.

Q. Who stopped it? Who ordered it stopped?

A. The hatch tender, they have got to do that.

Q. And then the winch driver, Rigney, put the winches in neutral and stopped it, is that right?

A. Yes.

Q. Are you sure he stopped it?

A. Yes, sir.

Q. You are positive he stopped it?

A. Sure.

Q. As a result of lowering that strongback down and stopping it, did it swing back and forth?

A. It swung a little, the same as all beams does on [92] a ship.

(Testimony of Alfred L. Dillon.)

Q. All beams swing when you are putting them in this position, don't they?

A. Yes, but you get hold of them and you steady that, you see.

Q. Was there a tag line on that spreader?

A. You mean a guy line?

Q. Yes, a guy line.

A. No, sir, no guy lines.

Q. When the strain was taken off the winches, or the current shut off, then the strongback was swinging gently thwartship, was it?

A. Just as they got it down, she just swung a little and I grabbed it.

Q. Where were you standing just at the moment you grabbed it with reference to this hatch, about the center of it on the port side?

A. The center of the hatch?

Q. Yes. A. No.

Q. In the center of the wing, I mean.

A. No, I was—I will have to get on the floor, you will have to excuse me.

Q. With the Court's permission——

The Court: You may do that. [93]

A. I want to explain this thing to you. We will say this chair is the hatch.

Q. Which is forward and which is aft?

A. This is forward, this is aft, this is the port side, this is the starboard side.

Q. Where were you standing?

A. This is the port side, starboard side, forward

(Testimony of Alfred L. Dillon.)

and aft. When the beam is coming in, we are all under here, and some is in the wing and I was standing here (indicating). They couldn't even see me where I was standing.

Q. At the time that this strain was taken off the strongback, what did you do then?

A. I went and got hold of the strongback to bring it into position.

Q. Which way was it swinging?

A. It was swinging this way, thwartship.

Q. Which way did you stand behind the strongback, or in what position?

A. Here was the strongback, here is the line with my hand on the spreaders, and this hand on the strongback.

Q. You were standing behind the strongback?

A. Not behind it.

Q. The strongback was in front of you, wasn't it?

A. No, it was like this (indicating).

Q. This strongback was swaying gently back and forth? [94]

A. No, not then.

Q. When had it swayed?

A. Just when she came down.

Q. I understood you to say that after the strain was taken off the strongback, that it then swayed and you went to steady it?

A. That's right.

Q. And you then came forward and stationed

(Testimony of Alfred L. Dillon.)

yourself on the port side and reached over and grabbed the spreader?

A. I grabbed the spreader, yes.

Q. Why did you grab the spreader?

A. For to steady it, for to bring it back. You see, you have got to get hold of the spreader and beam to get it back.

Q. You wanted to put it right in the slot?

A. Yes, sir.

Q. Would you illustrate to the Court how you grabbed the spreaders, where your right hand was and where your left hand was?

A. My right hand was here.

Q. Where is "here"?

A. This is the beam, I am taking this as the beam.

Q. All right, that is the beam. What end of the beam was your hand on?

A. It was here (indicating). [95]

Q. Was it on the side, or what part?

A. Oh, yes, you get a grip on it.

Q. This isn't a king beam, but it is a reproduction of an ordinary beam. Would you illustrate to the Court the position of your right hand on that beam?

A. I will. Here is the port side.

Q. You are on the port side?

A. This is forward and this is aft. The beam is up here.

Q. About three feet, a little forward of the slot?

(Testimony of Alfred L. Dillon.)

A. Yes. That is the beam. Here is the spreader here, and a spreader here on the other side. I had ahold of the wire spreader like that, and my hand here.

Q. You had hold of the wire spreader with your left hand? A. That's right.

Q. Where did you place your right hand?

A. Right here (indicating).

Q. How far above the slot were you at the time you placed your hand on that top flange of the end of that strongback?

A. How far? About here, like this.

Q. About two feet? A. Yes.

Q. And you were pulling it back? [96]

A. For to get to the slot.

Q. With your right hand, grabbing hold of that flange on the end? A. That's right.

Q. And then had you succeeded in bringing the strongback back over the slot?

A. Yes, and then she came right down without any warning.

Q. During all this operation, your attention was naturally focused on trying to get this beam lined up with the slot? A. That's right.

Q. You don't know what signals, if any, were given?

A. There was no signals at all at that time.

Q. But you didn't see anybody's signal given because you were concerned with your work?

A. There was no signaling, because he generally

(Testimony of Alfred L. Dillon.)

says, "Come back" and you can hear it.

Q. You didn't see anybody give any signals?

A. No, I didn't.

Q. You don't know whether the hatch tender on the deck, Snellman, gave a signal to Rigney to lower away, do you? A. I do not.

Q. How long in point of time was it from the time the [97] strain was taken off the strongback until the accident? A. How long?

Q. Yes. A. It wasn't even a minute.

Q. In your oral discovery deposition, which we took some time ago, Mr. Dillon, you said it was three minutes. I believe.

A. You are getting ahead of the story. It was just a minute I was caught with the beam, and held there for three minutes.

Q. I asked you in your oral discovery examination—counsel, I am referring to Page 15, lines 2 and 3—

"Q. How long was it from the time the power was off until your accident?

A. About two or three minutes, I should judge."

A. That I was held?

Q. No, I asked you, "How long was it from the time the power was off until your accident?" You said about two or three minutes.

A. I said it?

Q. Yes. A. Who to?

Q. To the reporter, when you were sworn under oath in your oral discovery deposition. Do you want to change that statement? [98]

(Testimony of Alfred L. Dillon.)

A. No, I wouldn't change anything.

Q. Would you say it was one minute or three minutes?

A. It was three minutes I was held there.

Q. It was one minute from the time the power was off until your accident?

A. Yes, sir.

Q. When you put your right hand in the position that you did on the flange of the strongback, it was then right on a line, the right fourth and little fingers were then right over the slot, were they not?

A. See, this is the slot. Here is the beam. You hold it up. We will say that is two and a half feet. This hand was forward with the spreader. Now then, here is the spreader and I had the hand like this, and just getting it over the slot like this, and down she came, quick, because I couldn't get it out. It was sandwiched.

Q. At that time, just before, when you say this fell, your hand was right on top of that flange?

A. That's right, like this (indicating).

Q. When you felt or saw that the strongback was slipping or falling, why didn't you remove your hand?

A. If I had done that, if this hand had gotten loose, you understand——

Q. I am referring to your right hand.

A. That is all right, but the left hand has got something to do with this, too. If I could get loose of this hand, I would have had this hand clear

(Testimony of Alfred L. Dillon.)

and just shoved the beam in, but I couldn't get this hand loose. It was kind of a weight to balance.

Q. If I understand you, the strongback was just above the slot in position just a second or so before your injury, isn't that right?

A. I just got it over and then she come right down

Q. Therefore, when you felt the strongback slip, all you had to do was relax your grip?

A. I couldn't because I would be pulled down into the hatch by the spreaders.

Q. Why couldn't you relax your grip on the spreaders? A. I couldn't.

Q. What prevented you?

A. What we call the whisker of the wire.

Q. If you will be patient with me, explain why you couldn't relax your grip on the wire with your left hand and your grip on the flange with your right hand?

A. I am telling you. That hatch is this way, and this hand caught here with the wire whisker, and I couldn't get this hand loose and I wasn't going to let that beam hit me all the time.

Q. Mr. Dillon, to refresh your recollection, wasn't the reason that the power was turned off and the winches [100] put in neutral because of the fact that this strongback had gotten fouled up in the slot? A. No.

Q. Do you remember you or any other fellow longshoreman taking some hatch covers just before

(Testimony of Alfred L. Dillon.)

your accident and trying to knock or release the port side of the strongback from the slots where it had become fouled? A. No, I do not.

Q. You are positive that did not occur?

A. That wasn't done on my side. It wasn't done on the starboard side.

Q. How long after the accident was it before you learned what caused your accident?

A. After I learned?

A. I learned it, all right, the minute the accident occurred because I seen what happened.

Q. Mr. Dillon, to go back a minute, did you have your right hand under the base of that strongback? A. No, sir.

Q. It was always on top of the flange?

A. Yes, sir.

Q. How far in was the hole in which the spreader was fixed?

A. You are talking about the—— [101]

Q. The hole in the strongback.

A. You are talking about the spreaders, the hole goes into the strongback how far?

Q. Yes, in from the end of the beam itself.

A. You ought to know that if you have seen the beam.

Q. I am asking you.

A. I can explain it if you let me see that beam.

Q. Yes, surely. Just tell us generally, a foot, two feet?

A. I am not telling you anything. You can see

(Testimony of Alfred L. Dillon.)

what I am doing with this beam. Here is the beam here, and you have got the spreader hole here, and here, and a bigger hole here, and a smaller hole here, and a hole here.

Q. How far from the end of that beam was this hole you were working on?

A. Maybe four or six inches, I wouldn't say how far. That is all the answer I can give you.

Q. Mr. Dillon, did the hook from the spreaders become detached from the hole at any time?

A. No, sir.

Q. When you were leaning over that to pull the spreader back over the slot, was the weight of your body against that beam?

A. No, sir, not at all because the body against the beam, that would be dangerous. [102]

Q. This particular spreader, did it have toggles on it?

A. No, just hooks, pontoon spreaders.

Q. After your accident, you were under the care of Dr. Edmund Smith for many months?

A. Yes, sir.

Q. Did you cooperate with Dr. Smith?

A. I cooperated with him every time he told me to come down, yes.

Q. You took all the treatment he ordered for you?

A. Yes.

Q. And you received for a considerable period of time until you brought this lawsuit, compensa-

(Testimony of Alfred L. Dillon.)

tion under the Longshoremen and Harbor Workers' Act? A. Yes, sir.

Q. Since you instituted this action, have you earned any money from any wages at all?

A. No, I have not.

Q. Have you looked for any employment?

A. Well, how am I going to look when this shoulder is pulling like the dickens, and this hand? Where am I going to get a job at this age? The union wouldn't even give me a job with a hand like this.

Q. My question was whether you looked for it?

A. My answer would be no, not unless this hand is [103] fixed up.

Q. In other words, have you a belief that until somebody fixes that hand up, you are not going to try to do anything?

A. Well, I have been trying to get to do a little business with this hand, and I am not getting it yet.

Q. Mr. Dillon, do you remember when you were receiving your compensation insurance that you were interviewed by Mr. Martin Packard on September 17, 1946? A. On September?

Q. Yes. Did you give Mr. Packard a statement about the occurrence of this accident?

A. I gave a statement to him?

Q. Yes. A. No.

(Statement marked Respondent's Exhibit A-1 for identification.)

(Testimony of Alfred L. Dillon.)

A. There was a statement made there, but it wasn't Mr. Packard. Who the man was, I don't know.

Q. I may be misinformed as to who took it.

A. That is the reason I said no to Mr. Packard.

Q. Was the man who made it a big fellow, an ex-pug with a flattened nose?

A. I don't know who it was. I didn't know anybody in [104] that office. I know the statement what he made. I didn't make it out.

Q. You signed it?

A. He made it out and I signed it with my left hand, block printed it.

Q. Handing you what has been marked for identification as Respondent United States of America's Exhibit A-1, I will ask you if that is the statement you signed?

A. Well, I am going to tell you there has been a lot added to this since I signed it. Now, this paragraph at the bottom was added some way or another because it wasn't like that. My name was there and he says, "That's all I want to know. There will be nothing added to it."

Q. Is that statement except for the last paragraph the statement that you signed? Is that your signature on it?

A. No, that is not my signature.

Q. You are positive of that?

A. I am positive.

Q. You did sign a statement?

(Testimony of Alfred L. Dillon.)

A. I will show you my signature right now.

Q. You did sign some statement?

A. Yes, I did, in that office.

Q. When you first looked at that statement, you said it was the statement you gave except for the last paragraph. [105] Now, are you now changing that to state none of that statement was ever signed by you, read to and signed by you?

A. Just a minute, let me read this please. I haven't read it.

Q. Take all the time you want, I beg your pardon.

A. Well, the top part is all right, but I never seen this bottom part.

Q. Now, your testimony is that the top part is all right and that is what you signed, but you didn't sign the bottom part?

A. This is not my writing here, because I can't block print like that with the left hand.

Q. I want to know whether or not you signed that statement, any part of that statement?

A. No, I did not.

Q. You would say that that signature, Alfred Dillon on the bottom of that statement is a forgery?

A. I couldn't say, but when I signed my name, it is always Alfred L. Dillon.

Q. My question is, is that your signature or is it not? A. I will simply say it isn't.

Q. You would say it isn't? A. Yes, sir.

Q. But you do remember giving some written

(Testimony of Alfred L. Dillon.)

statement [106] to some employee of the insurance company about September?

A. Or about that time, yes.

Q. And this is not the statement that you gave?

A. No. It wasn't on a white piece of paper, there was no lines on it.

Q. At the time the insurance company representative called on you, he asked you, didn't he, how you were getting along and how the accident happened?

A. He called on me?

Q. Yes, or was that statement given at the office of the insurance company?

A. No insurance company called on me.

Q. I mean a representative, the man you gave this statement to?

A. They were in the office, in their office.

Q. So you went to the office of the insurance company?

A. To the insurance company, yes.

Q. And there you gave this statement.

A. I didn't give no statement. He had a white sheet of paper with this top part written on, and he says, "I'll guarantee you there'll be nothing added to it," and I signed it. I says, "I can't write." He says, "Try it down here, do the best you can."

Q. That is not the statement you signed at that time? [107]

A. It isn't the same piece of paper.

(Testimony of Alfred L. Dillon.)

Q. I say, it is not the statement that you signed at that time?

A. I only signed one statement. That's all they got.

Q. My question is, is that paper in front of you, Respondent United States of America's Exhibit A-1, the statement that you signed in the office of the insurance company?

A. The top part seems to be right, but this bottom part don't.

Q. Is that your signature on it? That is what I am trying to find out.

A. Well, my signature—if it was right, the L. would have been there in the center, because I always sign anything with the full name.

Q. My question is, is that signature on that exhibit your signature?

A. Do you want to see my signature?

Q. No, I am asking you to identify it, if you can.

A. You see where that is——

Q. I say, is that your signature?

A. No, it isn't.

Q. At the time you had this conversation in the Vance Building with this insurance company representative, did you make a statement to him at that time that your accident wasn't the result of any mechanical defect on the part of the [108] winches?

A. No, there was nobody ever asked me anything about that.

(Testimony of Alfred L. Dillon.)

Q. This insurance representative didn't ask you any such question? A. No.

Mr. Franklin: That is all, thank you.

Redirect Examination

By Mr. Zabel:

Q. The statement that you say you gave one there, was that in your handwriting or was that in the handwriting of the man that made the statement?

A. It was already written out on a piece of white paper.

Q. And the one that you signed, did you read it over before you signed it?

A. Yes, I could read it right off without any sheet of paper, what was on the sheet of paper. It was where was I born, was I married, single or so forth, and my home address, where I live right now. He says, "I'll guarantee you there'll be nothing more on that," but it was on a white piece of paper. I put my full name on it.

Q. At that time, this man asked you how it happened?

A. Nobody asked me in that office how anything happened. [109]

Q. How you got your hand hurt?

A. No, they never asked that question.

Q. On this statement that was signed, what was that for?

A. That was just where I was born, was I ever

(Testimony of Alfred L. Dillon.)

married, my mother's and father's name, and so forth, such as that. It was on a white piece of bonded paper, as you call it.

Q. Counsel asked you if there were any guide lines on this spreader?

A. No, there was no guide lines.

Q. Are there supposed to be guide lines on it?

A. Yes, sir, for safety.

Q. If there had been a guide line——

Mr. DuPuis: On behalf of the third party respondent, I object. This is beyond the issue of the pleadings, no allegation of that sort in the complaint.

Mr. Franklin: I join in that objection.

Mr. DuPuis: I move to strike the answer.

Mr. Zabel: He brought up the issue.

The Court: The objection is overruled, in view of the cross-examination.

Q. If the guide lines were there, would you then use the spreaders to hand onto?

A. No, I would not. I would hold the guy line, that is what they are on there for, for safety.

Mr. Zabel: I think that is all. [110]

Mr. Franklin: That is all, thank you.

The Court: You may step down.

(Witness excused.)

The Court: Call plaintiff's next witness.

Mr. Zabel: Mr. Brooks.

Mr. Franklin: If the Court please, may I ask

(Testimony of Alfred L. Dillon.)

Mr. Dillon one last question at the table here? It calls for a yes or no answer.

The Court: You may do so.

Mr. Franklin: Was this beam you were injured on the first beam you put in?

The Witness: There was only one beam in that hatch.

Mr. Zabel: Are the guide lines part of the ship's equipment?

The Witness: They are supposed to be for safety. That is in the safety program on the water-front.

DAN BROOKS

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows: [111]

Direct Examination

By Mr. Zabel:

Q. What is your name?

A. My name is Dan Brooks.

Q. What is your occupation?

A. Longshoreman.

Q. How long have you been such?

A. 32 years.

Q. On or about May 13, 1946, were you in the gang with Mr. Dillon stowing cargo in hatch No. 1 of this ship Goucher Victory? A. Yes, sir.

Q. What side was Mr. Dillon working on of the ship? A. On the port side.

(Testimony of Dan Brooks.)

Q. What side were you working on?

A. On the starboard side.

Q. Do you recall the accident to Mr. Dillon while you were on duty at that time?

A. Yes, I do.

Q. Did you actually see the strongback drop on the libelant's, Mr. Dillon's, hand at that time?

A. I didn't see it drop, I seen it after that.

Q. But you didn't actually see it drop on his hand? A. No, I didn't. [112]

Q. But after it dropped on his hand, what did you do?

A. I run over there to see if I could help.

Q. Was the foreman there at that time, Mr. Petri?

A. I don't remember him being in that deck until the accident happened.

Q. Was he there before it happened?

A. No, I don't remember seeing him there before it happened.

Q. With reference to electric winches, have you worked on ships using electric winches in the past several years? A. Many times.

Q. Steam winches?

The Court: That last statement is not responded to. Is it a statement or a question?

Mr. Zabel: I will restate it, Your Honor.

Q. Have you worked on ship with all types of winches? A. Yes, I have.

Q. What types? A. Steam and electric.

(Testimony of Dan Brooks.)

Q. And this ship had what type of winches upon which you were working?

A. This ship had electric winches.

Q. From your experience, where electric winches were [113] used, what have you to say with reference to their safety?

Mr. Franklin: If the Court please, that is objected to. There is no contention made in the libel that the use of electric winches is unsafe. The particular charge made is a specific charge of negligence. It is highly improper.

The Court: Sustained.

Mr. Zabel: You may cross-examine.

Mr. Franklin: No questions.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Zabel: Mr. Rigney.

PAUL RIGNEY

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zabel:

Q. What is your name?

A. Paul Rigney.

Q. Will you spell your name, sir? [114]

A. Paul R-i-g-n-e-y.

(Testimony of Paul Rigney.)

Q. Otherwise, are you known by another name?

A. Yes, sir.

Q. What is that? A. Rip O'Day.

Q. You are called that by your fellow workmen?

A. Yes, sir.

Q. You live in Seattle? A. Yes, sir.

Q. What is your occupation?

A. I am a longshoreman, stevedore, and winch driver.

Q. How long have you been engaged in that type of work? A. Since 1927.

Q. Was that all carried on here in the Seattle waterfront? A. Yes, sir.

Q. On May 13, 1946, what was your occupation?

A. I was a winch driver.

Q. Were you a winch driver on the MS Goucher Victory on May 13, 1946? A. Yes, sir.

Q. What type of winches did it have?

A. Electric winches.

Q. Do you recall when you went on duty? [115]

A. Six o'clock.

Q. P.M.? A. Yes, sir.

Q. Do you recall an accident with reference to the libelant in this case, Alfred L. Dillon?

A. Yes, sir.

Q. Where were the loads being placed?

A. In the lower hold.

Q. Of which hatch?

A. No. 1, lower hold.

Q. Had you loaded cargo in the lower hold first?

(Testimony of Paul Rigney.)

A. Yes, sir.

Q. At the time of the accident, what about the lower hold? Was that filled up?

A. That I couldn't say because I didn't see the lower hold.

Q. At the time of the accident to Alfred R. Dillon, what was being hauled with the electric winches and equipment? A. I didn't hear that.

Q. At the time of the accident, what were you moving?

A. At the time of the accident, we was loading a beam on the poopdeck to the lower tween deck to put it in the socket. [116]

Q. In operating the electric winch, do you operate it in obedience to signals given by a hatch tender? A. Yes, sir.

Q. Who was the hatch tender at that time?

A. Mr. Selman.

Q. How do you spell that?

A. I guess it is S-e-l-m-a-n.

Q. Will you state the course of the movement of the strongback from the time it left the poopdeck until it was brought down to the tween deck hold?

A. Yes. They had to hook it up with the spreaders, had to lift it, lower it down to the lower tween decks where I was given the signal to come down with it. Then I was stopped, then they gave me another signal to come back, and then the brake didn't hold and bam, down she went.

Q. You say the hatch tender was giving you a

(Testimony of Paul Rigney.)

signal to let it down. How do you let those down, fast or slow?

A. You come back easy, like this (indicating). This means slow. When he goes all the way down like that (indicating) it means a little faster, and he kept giving me this, see (indicating).

Q. What happened? You say she dropped down?

A. Yes.

Q. What happened?

A. The brake didn't hold. Sometimes your points [117] don't catch and you jump them points and it releases itself automatically. Don't do it all the time, though.

Q. When this beam was dropped down, what was done?

A. The only thing I know, it got Mr. Dillon's hand caught and I heard a lot of hollering. He says, "Hold them winches," and a lot of hollering, and the guy says, "Hold everything" and I heard a lot of noise down there. I guess they was a little excited themselves, and Mr. Dillon's hand was caught. That is all I know, and I guess they tried to pry it up with a hatch according to what I heard, I don't know.

Q. Did you finally lift the beam off?

A. Yes, I am pretty sure.

Q. Off his hand, I mean?

A. Yes.

Q. Had you had any difficulty with the winches prior to that time?

A. Yes, sir.

Q. Just state what difficulty you had.

(Testimony of Paul Rigney.)

A. Well, the brakes didn't hold on two occasions.

Q. What happened when they didn't hold?

A. You come back and it seemed like she jumped the points and bam, she'll go right back.

Q. Did you make any complaint?

A. Yes, sir. [118]

Q. Before this accident?

A. Yes, sir, twice.

Q. Following this accident, was anything done to remedy the situation?

A. Yes, we stopped and examined all the gear.

Q. Was anything done with reference to the winches?

A. Well, we tried the controls and everything, and adjusted them on each point. Then we come back and done the same thing. Sometimes she would hold; sometimes it wouldn't hold.

Q. How do you tighten those brakes?

A. Well, to tighten those winches, there are certain kinds of electric winches——

The Court: No, this particular winch that had its brakes slip on the occasion of the accident.

The Witness: Well, that I couldn't say because the guy fooled around there with something.

Q. How is that?

A. That I couldn't say because the guy fooled around there with something. He done something to the winches twice.

Q. Who was that?

A. I should think it was the deck engineer.

(Testimony of Paul Rigney.)

Q. You say he worked on the winches there?

A. Yes. [119]

Q. In other words, you didn't do the tightening or the work? A. No.

Q. That was done by the ship's crew?

A. That's right.

Mr. Franklin: That is objected to as leading.

The Court: Sustained.

Q. As far as you yourself were concerned, did you tighten the winches? A. No, sir.

Q. Or have anything to do with that part of it?

A. No, sir. I only represent one union, I don't belong to two of them.

Q. Could you give an estimate of the weight of that beam that was lowered in the No. 1 hold?

A. It wasn't so big a beam as some beams we handle. I should judge it weighed about 1,000 or 1,200 pounds.

Q. It is steel, is it? A. Yes, sir.

Mr. Zabel: You may cross-examine.

Cross-Examination

By Mr. Franklin:

Q. Mr. Rigney, where did this accident happen? Where was the vessel? [120]

A. Pier 37 North, at the Seattle Port of Embarkation.

Q. When did you go to work?

A. We went to work six o'clock.

Q. Were you driving winches continuously until

(Testimony of Paul Rigney.)

Dillon's accident and afterwards? A. No.

Q. There were times when you would be relieved?
A. That's right.

Q. Was the Goucher Victory a new ship?

A. Well, I should imagine it was built during the war. I don't know the year it was built.

Q. It had regular conventional electric winches on her?
A. Yes.

Q. You said that you had some trouble with the winches on two occasions before Dillon's injury?

A. Yes, sir.

Q. Fix the time of the first trouble.

A. Well, I should judge about 7:30.

Q. Let me ask you, before you started in winch driving, you tried the winches yourself, didn't you?

A. Yes.

Q. That is customary and is always done?

A. That's right, and see that the gears are safe.

Q. Those stevedores won't work if the equipment is [121] not safe?
A. That's right.

Q. And you tested them when you first went to work that evening?
A. Yes.

Q. What tests did you give them?

A. We went up and down on them.

Q. And found they operated satisfactorily?

A. Yes.

Q. You were satisfied to work there?

A. Yes.

Q. You say you noticed something occurring at 7:30?
A. Yes, sir.

(Testimony of Paul Rigney.)

Q. What was that?

A. The same thing that happened when I was lowering the beam.

Q. What was it happened at 7:30?

A. Slipping of the brake.

Q. How far did it slip?

A. I don't know about that. It must have slipped about two or three feet.

Q. Where was the load at the time it slipped, or did you have a load on it?

A. Yes, we were lowering the lower hold.

Q. And it slipped two or three feet? [122]

A. Yes.

Q. Did you report that condition to the foreman of the stevedores?

A. I reported it to the hatch tender.

Q. If there is a defective condition present, the ordinary customary procedure is for you to report it to your foreman so he can take it up with the ship's personnel, isn't it?

A. My hatch tender is my superintendent and he takes it from there on.

Q. In other words, whether he reported it to the foreman, you don't know? A. No.

Q. Would you expect him to report a condition of that kind to the foreman?

A. Yes, sure.

Q. Was anything done at 7:30 with reference to any repairs conducted on them?

A. Yes. A man come around and tinkered around with them winches.

(Testimony of Paul Rigney.)

Q. That was 7:30? A. Yes.

Q. Who was this man that came around?

A. I don't know. He was a member of the ship's crew. [123]

Q. Do you know how many of the ship's crew were on board the vessel? A. I do not.

Q. You know there is a night mate aboard the vessel? A. Yes.

Q. Did you ever report that to the night mate?

A. It must have been reported to him because—

Q. I say, did you? A. I did not.

Q. Do you know if Selman did?

A. Somebody reported it, I don't know.

Q. Who is the ship's personnel that ordinarily would be called if there is anything wrong with the functioning of the winches?

A. The First Mate, I guess, and then the electrician.

Q. And there was an electrician aboard that night, was there not? A. I don't know.

Q. When was the next time that there was anything wrong with this?

A. About 20 minutes to nine, or somewhere in there.

Q. That would be about 8:40? A. Yes.

Q. What happened then? [124]

A. The same thing.

Q. What did you do then?

A. We stopped again.

Q. And who did you report the condition to?

A. The hatch tender.

(Testimony of Paul Rigney.)

Q. Was anything done about it? A. Yes.

Q. What was done?

A. The man came up and looked at it again, that's all.

Q. Did he do anything?

A. Not that I recall.

Q. Just look at it? And you continued, did you not? A. Yes.

Q. At the time, you couldn't see this accident from where you were handling the winches?

A. No, sir, that is a blind hatch.

Q. By that, you mean there is a pontoon that would obstruct your view? A. Yes.

Q. You had to rely on the hatch tender to give you signals? A. That's right.

Q. Selman, the hatch tender, was foreward of your winches at the other end of the hatch, wasn't he? [125] A. Yes.

Q. What is the width of the hatch?

A. I don't know.

Q. Getting down to the occasion of this injury to Dillon, you say that you were lowering the strongback into position? A. Yes.

Q. As you lowered that, there were spreaders attached to this on the poopdeck? A. Yes, sir.

Q. Selman gave you a signal to lower away?

A. Yes, sir.

Q. How do you do it ordinarily with your electric winches? How do they operate?

A. I came back one notch.

(Testimony of Paul Rigney.)

Q. When you are completely stopped, that is neutral, is it? A. Yes.

Q. So you went from neutral up one notch?

A. Yes.

Q. Did that lower that strongback slowly?

A. Yes.

Q. Very slowly? A. Yes.

Q. One notch? [126] A. Yes.

Q. Who directed you when to stop?

A. The winch driver.

Q. Selman told you when to stop?

A. Well, it already had dropped, see.

Q. Let's go through this again. You are lowering the strongback? A. Yes.

Q. Then you got a signal from the hatch tender to stop? A. Yes.

Q. And you did stop, didn't you? A. Yes.

Q. You put it in neutral? A. Yes.

Q. Is it customary when you bring the winches to a stop when you are lowering a strongback weighing approximately 1,000 pounds or so that you have testified, that it sways a little back, swing back and forth? A. Yes.

Q. How long in point of time until you executed your next movement?

A. If I recall right, he says, "Come back" and then——

Q. I say, how long until you got your next order from Selman? [127]

A. For as long as it took them to get the beam in place.

(Testimony of Paul Rigney.)

Q. That does not answer my question. How long were you stopped before you got another order from Selman to come ahead?

A. I will say about a minute.

Q. Could you see yourself what was happening below in that minute? A. No.

Q. Then the next thing, you got an order from Selman to do what? A. To come back.

Q. By come back, what do you mean, raise or lower? A. Lower it.

Q. So you got that order from Selman to lower it? A. Yes.

Q. Could you tell about how far above the slot you were from handling the winches and the amount of falls that were out? A. No.

Q. So you got an order from Selman to gradually lower away? A. Come back, yes.

Q. And you did that? A. Yes, sir. [128]

Q. And the winches responded to that order?

A. No, that is when they gave way.

Q. But as I understood, you already had the order from Selman to lower away? A. Yes.

Q. And you proceeded to do that?

A. Yes.

Q. Then the next thing you knew, you learned Mr. Dillon had been hurt? A. Yes.

Q. Do you remember an incident occurring there where this strongback became fouled up, got caught in the slots, and they had to try and dislodge it?

A. Only what I heard.

(Testimony of Paul Rigney.)

Q. What did you hear?

A. I heard that this guy pried a beam out to get his hand clear.

Q. You heard, didn't you, that this strongback got wedged in or fouled in the port slot, and an effort was made to try and free it? A. Yes.

Q. And the stevedores used hatch covers in an effort to dislodge it?

A. That's what I understand. I don't know if it is true or not. [129]

Mr. Franklin: That is all, thank you.

Mr. Zabel: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Zabel: Mr. Sellman.

CLAUD SELLMAN

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zabel:

Q. What is your name?

A. Claud Sellman.

Q. Spell your last name.

A. S-e-l-l-m-a-n.

Q. You are a resident of Seattle?

A. Of Kenmore, north of Seattle.

(Testimony of Claud Sellman.)

Q. In King County? A. Yes, sir.

Q. What is your occupation?

A. Longshoreman. [130]

Q. What type of work do you do in connection with longshoring?

A. Deck mate, they call it, winch driver, hatch tender.

Q. You have acted both as winch driver and hatch tender? A. Yes, sir.

Q. Were you on the ship, MS Goucher Victory, on May 13, 1946, at the time Mr. Dillon was working in the hold of the ship?

A. I was there at the time he was hurt, yes.

Q. What was your capacity?

A. Hatch tender.

Q. What time did you go on duty?

A. I am not sure that night whether we started at six or seven.

Q. P. M.? A. Yes, sir.

Q. But you were hatch tender at the time of an accident to Mr. Dillon's right hand?

A. I was.

Q. What type of winch was on this ship?

A. Electric winches, I don't know which particular make.

Q. You had loaded cargo in the lower hold before [131] this accident, as I understand it, the No. 1 hatch? A. That's right.

Q. Following that, the strongback or beam was being——

(Testimony of Claud Sellman.)

Mr. Franklin: Don't lead the witness.

The Court: Sustained.

Q. Was there a beam or strongback to be placed tween decks on the No. 1 hold?

A. That's right.

Q. Where was this beam or strongback?

A. I believe it was on deck, if I remember correctly.

Q. On the top deck? A. Yes, sir.

Q. How was the strongback connected to the apparatus for the moving of this strongback down to the tween deck hold?

A. They had a pair of spreaders. I don't know whether these had hooks or toggles on them. I don't usually handle them myself so I don't remember. I don't remember which particular type they were, it has been quite a while ago.

Q. Do you recall the movement of the strongback from the top deck down?

A. Yes. Wait a minute, I'm not just positive even that this beam was on the top deck. I think so, but this was quite a while ago. [132]

Q. But it was on an upper deck?

Mr. Franklin: Don't lead the witness, please.

Mr. Zabel: All right, I will withdraw it.

The Witness: That is where we usually put them, so I presume it was. We usually put the beam in that hold or on the top deck.

Q. What was your duty as hatch tender?

A. I was giving signals to the winch driver.

(Testimony of Claud Sellman.)

Q. In this case, did you give signals for the movement of this strongback?

A. I give the signal, yes.

Q. Just state the movement of it from the time it was moved and lowered.

A. Well, we picked up this strongback with the winches and as I say, I don't know which deck it was on for sure. I presume it was on the top deck, I know it was pretty high. They got hold of it down below and stopped 'til they got hold of it down it over the socket, when they got hold of the beam to steady it over the socket to land it.

Q. Were you in a position where you could see Mr. Dillon working?

A. Yes, sir, I could see him plain.

Q. You could see him at all times?

Mr. Franklin: Objected to as leading. [133]

The Court: It is sustained.

Mr. Zabel: I will strike that.

Q. Is it a part of your duty to watch the workman working in the hold as well as the winch driver?

A. That's what I'm supposed to do when you are tending hatch, yes.

Q. Now, just state in your own words how this beam was brought down and what you observed.

A. Well, we lowered this beam, as I say, into position where a man could get hold of it on each end to land it in the pocket and they had hold of each end. This beam was, I would guess, approximately two feet high above the pocket, so I always

(Testimony of Claud Sellman.)

make a practice of coming down when it just barely clears the pocket, within a few inches, so it would be sure and hit it and then drop it.

In this case, one man had hold of each end of the beam. It is only a light beam landing in this pocket. As I say, it was a couple of feet high yet, so I stick my hand out and give Rigney a signal to come back. I intended to lower it to within six inches of the pocket and stop to be sure I hit the pocket. When I gave the signal later to come back, the beam come right on down and dropped.

Q. What caused that?

Mr. Franklin: If you know.

A. Well, I know pretty well the only way it could [134] happen in this type of winch because it had been happening before that there was a lag between the time that a brake is released and the power goes on, run through those notches, they call them, does not run through very fast.

Q. The notches are on the winch?

A. They are on these handles, yes, sir. There is five notches on each side; one side hoists and one lowers and it would happen on this winch before and we had notified them the trip before we had trouble with it. I told the electrician on duty to see if he could get that fixed. He said he couldn't fix it that night but he would get at it tomorrow. That was the previous trip of this ship.

Mr. Franklin: The previous trip?

The Witness: Yes.

(Testimony of Claud Sellman.)

Mr. Franklin: A month previous?

The Witness: Something like that.

Mr. Franklin: We move the answer be stricken, if the Court please, on the ground it is immaterial, a month earlier.

The Witness: I am talking about this same winch.

Q. The same winch and the same ship?

A. The same winch and the same ship.

Mr. Zabel: I think it is material unless they [135] show they made repairs or something in between. They were having trouble with it 30 days before and they didn't do anything about it. I think it would be material.

Mr. Franklin: I submit, if the Court please, what happened 30 days before is utterly irrelevant, and immaterial to the specific allegation of negligence occurring a month later.

The Court: The objection is overruled.

Q. Just go ahead.

A. This night, as I say, the reason this dropped—that is the question I am answering, I believe—I consider this a reason and I asked them to get this winch fixed so when it commenced to hit this night, the first time I had the winches, I told Rigney, “You want to watch that port winch because she slips sometimes. You have got to be prepared to stop a few feet before you really intend to because sometimes she will drop several feet before she takes ahold when you are either stopping or starting. When you come to a stop if you run through those

(Testimony of Claud Sellman.)

notches slowly just about the time before you stop, it will drop several feet like that."

I told Paul that night, "This winch is in the same condition it was before," so when this happened, I figured what must have happened because you can't come back that [136] fast with power on those electric winches. They won't take off that fast.

Q. How are they supposed to operate?

A. They are supposed to operate so that it is either on power or on the brake at all times.

Q. Are you supposed to be able to control the speed at all times?

A. They are supposed to be under perfect control at all times, like when lowering a beam like this, you would only bring it back in the second notch in lowering, and you want to go down at a speed of just about like that (indicating) but when it drops like that, as I said, the man is caught. I asked Paul what happened. After we got him loose, he says, "Well, it just dropped."

Q. Was the beam then removed from his hand?

A. Yes. I held it there for a while. I wanted to know whether they could lift it off his hand because I didn't want to pick it up with the winch on account it might tear his hand. I think the walking boss, Petri, was around there some place right close, and I said to him, "Shall we pick it up?" He said, "Wait 'til I go down there." He run down the steps and looked and says, "Pick it up," so I give him the signal to pick it up.

(Testimony of Claud Sellman.)

Q. Was he in the hold before this accident happened?

A. He was either on deck right when it happened or [137] on the stairway leading down to the lower hold. He was around there close but it has been quite a while ago and I can't remember exactly where he was, but I was talking to him at the time or just after it happened.

Mr. Zabel: You may cross-examine.

Cross-Examination

By Mr. Franklin:

Q. This happened quite a long time ago and, of course, one's recollection isn't so good three years afterwards, is it? A. No, that is true.

Q. You said that you had worked these winches on a previous trip of this vessel?

A. That's right.

Q. And you talked to the chief electrician?

A. No, it was whoever was on watch. It was at night.

Q. Who is the usual member of the ship's crew in charge of servicing the electric winches?

A. Who is?

Q. Yes.

A. I look around there and I find an electrician on duty, that's all.

Q. You say that a month previously, you had talked [138] to the electrician on duty?

A. That's right.

(Testimony of Claud Sellman.)

Q. Do you know his name? A. No.

Q. When you were assigned to this job a month later, you had in mind that you had this conversation with the electrician a month earlier?

A. Sure, as soon as I found out the winches were the same way and they wasn't fixed.

Q. As hatch tender, you were in charge of the gang? A. That's right.

Q. Before you or Rigney started to use those winches, did you test them?

A. I don't think so, especially.

Q. As a matter of fact, you always test winches, don't you, to make sure they are satisfactory?

A. Usually, run through the notches and see if they run.

Q. And that was done by you or Mr. Rigney?

A. I think he drove the first hour.

Q. And they were satisfactory, weren't they?

A. I don't know. You drive them whether they are satisfactory or not.

Q. You know, you were there, don't you?

A. Sure, I was there. [139]

Q. There wasn't anything wrong with the winches up until Mr. Dillon's accident, was there?

A. Yes.

Q. What was it?

A. The same thing, when you are going to land a load, sometimes it will slip two or three feet before it stops.

(Testimony of Claud Sellman.)

Q. How many times did that occur before Mr. Dillon's injury?

A. Maybe half a dozen times, maybe not.

Q. Did it, half a dozen times?

A. When I was over the hatch, I always make a practice to give him the signal to stop quite a ways up.

Q. I am asking you how many times the winches slipped after they were stopped on the evening of Mr. Dillon's injury before his accident occurred?

A. After they were stopped? I didn't say anything about them slipping after they were stopped.

Q. What did you say was wrong with them?

A. When you are coming to a stop, sometimes they would drop before the brake caught.

Q. How many times did that occur?

A. I didn't keep track of it.

Q. Was it a matter of any importance to you?

A. Not an awful lot, as long as it didn't spill any [140] loads or land a load on anybody.

Q. Do you think the winches were defective in any way? A. To that extent, yes.

Q. Did you report that alleged condition to the foreman, Mr. Petri?

A. I don't know whether I did or not.

Q. Wouldn't you if you felt it was dangerous or hazardous?

A. I tried it the previous trips and didn't get any results. I know on these Army ships, it is no use.

(Testimony of Claud Sellman.)

Q. Did you report this condition to Mr. Petri?

A. I think Paul did.

Q. Mr. Rigney reported it?

A. I think so.

Q. You didn't report it?

A. I don't think I said anything about it to him.

Q. As a matter of fact, as a member of the Longshoreman's Union, you have a contract that you are not permitted or required to work under unsafe conditions?

A. That's right.

Q. If you find winches are unsatisfactory or unsafe, you close the job down until they are repaired?

A. Well, not unless they are awful bad. Otherwise, we would be going home pretty early pretty often. [141]

Q. But you yourself in charge of the gang made no complaint either to Mr. Petri or to any of the ship's officers about the alleged condition of this winch?

A. I don't think I did that night. I don't remember of it, anyway.

Q. After this accident happened to Mr. Dillon, did Mr. Rigney continue to drive the winches?

A. I believe he did.

Q. And you had no more trouble with them, did you?

A. Well, the same thing.

Q. That same condition persisted?

A. Sure.

Q. At any time that evening, did you call that to anybody's attention?

(Testimony of Claud Sellman.)

A. I think I told the gang.

Q. I mean to the foreman?

A. I don't know.

Q. Or to the ship's officers?

A. What is the question?

Q. Did you report that condition to Mr. Petri, the foreman, or any of the ship's officers?

A. Well, I don't know if I did or not. I suppose I did.

Q. Would you say you did or didn't?

A. I wouldn't say because I don't remember for sure. [142]

Q. What of the ship's personnel was aboard that night if you remember. A. I don't know.

Q. Is there a night Mate?

A. Commonly is a night Mate, yes.

Q. Was there an electrician aboard the ship?

A. I don't know.

Q. Whose duty would it have been, whether there was an electrician or Mate or not, to repair the defect in the winch? A. Whose duty?

Q. Yes. A. The electrician.

Q. Getting down to immediately before the accident to Mr. Dillon, you were foreward of the hatch, were you? A. Foreward of the hatch?

Q. Yes.

A. No. I was alongside the hatch.

Q. Mr. Rigney testified, if I understood him correctly, you were in the foreward end of the hatch facing him, is that right?

(Testimony of Claud Sellman.)

A. Not in this type of ship, I don't think.

Q. I beg your pardon?

A. I must have been on the side of the hatch, if I remember right. [143]

Q. You were close to him?

A. Where he could see my hand.

Q. And you could see down below into the lower hold?

A. That's right.

Q. Pardon me, I meant into the tween deck. This strongback was then lowered down into the tween decks by Mr. Rigney on the signals that you gave him?

A. He lowered according to my signal, yes.

Q. When he lowered it down off the poopdeck down below to the tween decks, did he do so rapidly or slowly?

A. I don't know for sure it was on the poopdeck or not, might have picked it up from the other to the tween decks.

Q. From wherever it was, was it lowered down into the tween decks slowly or rapidly?

A. Well, we lowered them pretty slow.

Q. Do you remember how this was lowered?

A. We always lower them slow.

Q. So this was lowered slow, was it?

A. Certainly.

Q. He was watching you and you were giving the signals?

A. That's right.

Q. How far down did you lower it before you gave him a signal to stop? [144]

(Testimony of Claud Sellman.)

A. I don't know where we pick it up from, that's what I say.

Q. How far above the deck of the tween decks was the strongback lowered before you gave the signal to stop?

A. I said I don't know where we picked it up from for sure.

Q. Apparently I don't make myself clear. I am trying to find out how far above the deck of the tween decks—let's say how far above the slot of the hatch coaming was the beam when you ordered it to be stopped?

A. I don't know. The first time, it was probably pretty high.

Q. Well, how high?

A. I wouldn't say for sure.

Q. Give us an idea.

A. I only remember clearly this far, when I stopped and let the man get hold of it. Whether I stopped before or only once, I don't remember that.

Q. But anyway, you stopped so the men could get hold of the beam. A. It was pretty high, yes.

Q. How far above the slot was the strongback at that time?

A. Well, at the time I stopped, when they got hold of it, as I say it was two feet or two and a half feet. [145]

Q. Was the strongback swinging?

A. Not much. They always swing some, of course.

Q. What was Mr. Dillon doing, or did you see

(Testimony of Claud Sellman.)

Mr. Dillon doing anything at that time just before his accident?

A. He grabbed hold of one end of the strongback to pull it into position over the slot.

Q. In other words, he grabbed hold of the strongback itself, did he?

A. I don't know whether it had a rope on it, a lanyard, a chain, whether he grabbed hold of the strongback, but I see him grab hold of it to steady it.

Q. When you saw him have hold of it, what side of the hatch was he on?

A. He was on the offshore side, that would be the port side.

Q. He was the only one handling his end?

A. I think so.

Q. What did you observe him do with reference to placing his hands in any position?

A. I don't know. He had hold of it to steady it.

Q. How did he have hold of the strongback while he was steadying it?

A. I don't know particularly.

Q. Didn't you see him grab the flange with his hand?

A. I may have. [146]

Q. You did? A. I may have.

Q. You don't remember?

A. Not particularly, no.

Q. Do you remember that as a matter of fact that strongback got fouled in that port slot and that is the reason it got hung up?

A. Got fouled in the port slot?

Q. Yes. A. How could it?

(Testimony of Claud Sellman.)

Q. I say, do you rememebrr or isn't that what occurred? A. Why, no.

Q. Isn't it true that Mr. Dillon and some of the other members were taking the hatch covers and trying to knock the port end of the strongback out of the slot so they could get it in a normal position? A. Absolutely not.

Q. After you saw Mr. Dillon have hold of the strongback, what orders did you give Mr. Rigney, the winch driver?

A. Just give him a signal like that (indicating).

Q. And that signal meant what?

A. Come back.

Q. By come back, you mean lower?

A. That's right.

Q. He executed that order, didn't he ([147])

A. I suppose he did.

Q. Do you know what notch he was on?

A. No, I don't know what notch he was on.

Q. When Mr. Rigney lowered the strongback pursuant to your orders, that is when this accident happened? A. That's right.

Mr. Franklin: That's all, thank you.

Redirect Examination

By Mr. Zabel:

Q. When he lowered it at that point, did it ease down or how did it go down? A. It dropped.

Q. Was that a normal way?

A. No. That is what I asked Paul, I says, "What happened?" It must have slipped, because

(Testimony of Claud Sellman.)

I know he can't come back that fast.

Mr. Zabel: That's all.

Recross-Examination

By Mr. Franklin:

Q. After Mr. Dillon's accident, how much longer did you use those winches?

A. I don't know, 'til they knocked us off that night.

Q. No further repairs were attempted to be made by [148] anybody?

A. Not that I know of. I think there was a guy around there, but I don't think he done anything.

Q. You yourself didn't see anybody from the ship's personnel attempting to repair those winches?

A. I wouldn't say for sure.

Q. You were around there, weren't you?

A. Yes, but I am looking into the hatch. The winches were over there.

Q. It would be a matter of fact, if these winches were defective, whether some member of the ship's personnel was there to repair it, wouldn't it?

Mr. Zabel: That is objected to as argumentative.

The Court: The objection is overruled.

The Witness: I don't know. They only slipped about two feet.

Q. The order you gave was to drop this beam in position? A. That's right.

Mr. Franklin: That is all, thank you.

(Testimony of Claud Sellman.)

Mr. Zabel: At that time, the beam was how high above the slot?

The Witness: Well, from my position I would say about two feet, might have been a little higher, might have been two and a half feet. [149]

The Court: This witness is excused.

(Witness excused.)

The Court: These proceedings are continued until tomorrow morning at 9:30.

(At 5:10 o'clock, p. m., Thursday, June 23, 1949, proceedings recessed until 9:30 o'clock, a. m., Friday, June 24, 1949.)

Seattle, Washington, June 24, 1949

9:55 o'clock, a. m.

Mr. Franklin: May I at this time impose upon the Court and counsel for libelant to present out of order the testimony of Captain Ness, who is required to take a ship down to Grays Harbor this afternoon. His testimony will be very brief.

The Court: You may do that. [150]

LOUIS NESS

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q: State your name, please?

(Testimony of Louis Ness.)

A. Louis Ness.

Q. How old are you? A. Sixty.

Q. What is your occupation or calling?

A. Master mariner.

Q. How long have you held a license as Master mariner? A. Since 1921.

Q. Any ocean, any tonnage?

A. That's right.

Q. On May 13, 1946, what was the nature of your employment?

A. I was night Mate on the Goucher Victory.

Q. By night Mate, what do you mean as to hours of employment?

A. I worked from 5:00 o'clock in the evening to 8:00 in the morning.

Q. You relieved the regular mate? [151]

A. Yes, sir.

Q. What are your duties as night Mate?

A. To look after the loading and unloading of the ship and see that everything is in working order.

Q. Where was the Goucher Victory docked on May 13, 1946? A. Pier 36, I think it was.

Q. That is the Port of Embarkation?

A. Yes, sir.

Q. Was any stevedoring work being carried on that evening?

A. They were loading stores, that's all I know.

Q. In what hatch? A. No. 1 hatch.

Q. Do you remember about how long they were engaged in loading stores?

(Testimony of Louis Ness.)

A. Well, they worked practically all night.

Q. Who loaded the stores, seamen or stevedores?

A. Stevedores.

Q. You were the only ship's officer available and on duty during the evening of May 13, 1946?

A. I was the only one aboard.

Q. Was there always a second electrician aboard?

A. Yes, they always had electricians to look after the operating of the winches. [152]

Q. What kind of winches were aboard the Goucher Victory? A. Electric winches.

Q. How many times would you make your rounds and visit in the vicinity of No. 1 hatch?

A. Well, I walked around the decks all the time during the night, when any work is done there on the ship.

Q. At any time was any complaint made to you as night Mate of the vessel that there was any defective condition existing in No. 1 winches?

A. No, sir.

Q. Did you have occasion from time to time to observe the operation of No. 1 winches?

A. Yes.

Q. How did they operate?

A. As far as I could see, they were operating all right.

Q. If there were any defect or complaint about the condition of those winches, what is the usual custom and practice as to who would be notified?

A. The electricians, on electric winches.

(Testimony of Louis Ness.)

Q. Who would notify the electricians?

A. I would, and longshoremen would notify me, and then I would notify the electrician.

Q. What is your testimony as to [153] whether any complaint whatever was made as to the condition of the winches to your knowledge?

A. No, sir, not that I know of.

Q. Did you hear of an injury occurring to Mr. Dillon, a stevedore? A. Yes.

Q. Did you make a log entry of that injury?

A. Yes, sir.

Q. Do you know who gave you the information as to the occurrence of Mr. Dillon's injury?

A. The foreman, I suppose, the stevedore foreman.

Q. At the time you received that information, what, if anything, was said as to whether the accident was caused by any defect in No. 1 winches?

A. No, I don't think there was any.

Mr. Franklin: That is all, thank you.

Cross-Examination

By Mr. Zabel:

Q. You didn't see the accident, did you?

A. No, sir.

Q. You don't know of your own knowledge how it happened? A. No, I don't.

Mr. Zabel: That is all. [154]

(Testimony of Louis Ness.)

Redirect Examination

By Mr. Franklin:

Q. After Mr. Dillon's injury, were the electric winches of No. 1 hatch operating satisfactorily?

A. Yes.

Mr. Franklin: That is all, thank you. With the Court's permission, may the witness be excused?

Mr. Zabel: Yes.

The Court: You may be excused permanently from further attending this trial.

(Witness excused.)

Mr. Zabel: The plaintiff rests, Your Honor.

The Court: The defendant may now proceed.

Mr. Franklin: In the interest of conserving the time, respondent will waive its opening statement. Respondents desire to call Mr. Packard.

MARTIN PACKARD

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows: [155]

Direct Examination

By Mr. Franklin:

Q. What is your name?

A. Martin O. Packard.

Q. Would you spell your last name?

A. P-a-c-k-a-r-d.

Q. Where do you live?

(Testimony of Martin Packard.)

A. 3037 - 35th West.

Q. What business are you presently engaged in?

A. Independent adjusting business.

Q. In September of 1946, by whom were you employed?

A. John H. Davis Company.

Q. What connection, if any, did the John H. Davis Company have with Mr. Alfred L. Dillon, the libelant in this case?

A. John H. Davis Company was the independent contractor handling all adjustments for Employer's Mutual of Wisconsin, and in that capacity he was handling the adjustment of the Longshore Compensation claim for Mr. Dillon.

Q. Mr. Dillon's employer was who?

A. Mr. Dillon's employer was Rothschild International.

Q. Who were the Longshore Compensation carriers for Rothschild?

A. Employer's Mutual of Wausau, Wisconsin.

Q. Do you know the libelant in this case, Mr. Alfred Dillon?

A. Yes, sir.

Q. How did you come to make his acquaintance?

A. I was appointed as adjustor by John H. Davis Company to handle the claim of Mr. Dillon.

Q. Was he paid compensation by your company?

A. Yes, sir.

Q. Directing your attention specifically to September 17, 1946, I will ask you if you saw Mr. Dillon on that day?

A. Yes, I did, sir.

Q. Where did you see Mr. Dillon?

(Testimony of Martin Packard.)

A. 324 Vance Building.

Q. Whose offices were those?

A. John H. Davis Company office.

Q. Who was present at this time? Was anybody present besides yourself and Mr. Dillon at that time?

A. John H. Davis.

Q. Where is John H. Davis now?

A. He is presently in San Francisco.

Q. What was done or what was the purpose of that meeting?

A. The purpose of that meeting was to establish—to take a statement establishing the present condition of Mr. Dillon's disability and also establish whether there [157] was any third party liability existing.

Q. In this case, what do you mean by third party liability, against whom?

A. Whether there was any negligence or liability against the ship.

Q. Upon which Mr. Dillon was injured?

A. Upon which Mr. Dillon was employed at the time of the accident.

Q. How long did your discussion of the matter with Mr. Dillon last?

A. We discussed it for a period of approximately one-half to three-quarters of an hour, and during that time we took a statement.

Q. During that time, during that discussion you had with Mr. Dillon, was Mr. Dillon asked whether any of the ship's defective equipment was respon-

(Testimony of Martin Packard.)

sible for his injury? A. Yes, he was.

Q. What was his answer to that?

A. He stated there was no defective equipment on the ship.

Q. Do you remember what ship it was?

A. SS Grouch.

Q. The Goucher Victory, wasn't it?

A. The Victory.

Q. Who wrote the statement that was prepared after [158] your discussion with Mr. Dillon?

A. John H. Davis.

Q. Was Mr. Dillon able to write it?

A. He signed the statement, I think he signed it by printing with his left hand.

Q. Why couldn't he use his right hand?

A. He alleged he was totally disabled in that hand.

Q. Handing you Respondent's Exhibit A-1, I will ask you if you can identify that statement?

A. Yes, sir. This is the pad, and the writing of John H. Davis and the printed name of Alfred Dillon as printed by Mr. Dillon.

Q. Did you see him print it? A. Yes.

Q. Did Mr. Dillon read that statement before he printed his name? A. Yes, sir.

Q. Did he offer any corrections?

A. No, sir.

Mr. Franklin: That is all, thank you.

The Court: Respondent's Exhibit A-1 has not been admitted yet.

(Testimony of Martin Packard.)

Mr. Franklin: I move at this time, if the Court please, that Respondent's Exhibit A-1 be admitted in evidence. [159]

Mr. Zabel: I object to it, Your Honor, for the reason, first, that there is no proof that he knows the handwriting of the man who wrote that statement that is written on that paper. There is no proof he knows the handwriting.

Mr. Franklin: I will clear that up.

The Court: Let him see the exhibit and ask him with reference to the specific thing before him. I want the witness' attention to be called to the writing on the exhibit, not only that in the body of the exhibit, but also the alleged signature of the person signing it.

Q. Directing your attention to Respondent's Exhibit A-1 for identification, can you identify the signature or the handwriting of the person who wrote all portions of that statement except the signature?

A. Yes, sir.

Q. Whose handwriting is it?

A. John H. Davis.

Q. Did you see him write it? A. Yes, sir.

Q. And you can identify it? A. Yes, sir.

Q. Directing your attention to the name signed at the bottom of Respondent's Exhibit A-1, can you identify [160] that signature as to who wrote it?

A. I can identify it by saying that the man—I saw the man write and print the signature with his left hand.

(Testimony of Martin Packard.)

Q. On Respondent's Exhibit A-1?

A. Yes, sir.

Mr. Franklin: Respondents renew their offer.

The Court: Ask him in that connection who did write it and whose signature is it?

Q. Who did print the name you have described at the bottom of that exhibit?

A. Mr. Alfred Dillon.

Q. Whose signature is on that document?

A. Mr. Alfred Dillon.

Q. That is Mr. Dillon, the gentleman sitting in the courtroom? A. Yes, sir.

Mr. Zabel: May I see the exhibit?

The Court: You may see it and you may inquire further on the voir dire examination as to this exhibit.

Voir Dire Examination

By Mr. Zabel:

Q. What time of the day was this?

A. I do not recall, during daylight hours and during [161] office hours.

Q. Is your work office work? A. Both.

Q. You are out of the office quite a bit?

A. I am out of the office and in the office.

Q. At that time, were you employed to investigate?

A. I was operating as the office manager, working outside of the office and in the office for John H. Davis Company.

(Testimony of Martin Packard.)

Q. John H. Davis Company is nothing more than John H. Davis? That is just himself, isn't it?

A. Well, it is a company.

Q. It isn't a corporation?

A. No, it isn't a corporation.

Q. Just an individual? A. Yes, sir.

Q. Just John H. Davis, and he calls himself John H. Davis Company, isn't that it?

A. Yes, sir.

Q. So you and John H. Davis were the ones working in the office? A. Yes, sir.

Q. What was his status in the office?

A. John H. Davis Company at that time was still there.

Q. No, I mean John H. Davis. [162]

A. John H. Davis was the owner of the business and also worked as an adjustor.

Q. And you worked as an adjustor?

A. Yes, sir.

Q. He was the owner and you were the manager?

A. I was acting as manager, past tense, sir.

Q. What time of the day was this, do you know?

A. No, sir.

Q. In this statement, you said there was no defective equipment. That was a general statement made?

A. It was a question asked Mr. Dillon and he answered by stating that there was no defective equipment.

(Testimony of Martin Packard.)

Q. Is that as far as you went in your inquiry?

A. We are always concerned with whether there is any third party liability.

Q. Did you ask about any details?

A. We did, during the conversation, but we didn't put all items down in the statement.

Q. You did not put all items down in the statement?

A. We put down all concerning his mention of the defective equipment of the ship.

Q. But your full conversation isn't in this statement, is it?

A. Yes, sir. The full conversation, the draft of the full conversation is in the statement. [163]

Q. The draft of it? A. Yes, sir.

Q. What do you mean by draft?

A. As I explained, we discussed this accident prior to the time we took the statement concerning the defective equipment of the ship, or the condition of the ship, but concerning the condition of his hands and so forth.

Q. He was getting compensation, wasn't he?

A. I believe he was, yes, sir.

Q. Was this written down piecemeal or was it written all at once?

A. It was taken down piecemeal.

The Court: How did you proceed? Did you talk with him about each piecemeal writing or statement, or did you just talk with him about the whole situation and then write it all down and ask him to

(Testimony of Martin Packard.)

sign it without explaining it to him? How did you proceed with reference to keeping him advised as to the details?

The Witness: We asked him specific statements, and as he made these specific statements, we wrote them down.

The Court: Do you know whether they were written down accurately as he in substance, at least, stated the answer?

The Witness: Yes, sir, they were written accurately. [164]

The Court: Is the statement now an accurate statement of what he said, at least the substance of what he said?

The Witness: Yes, sir.

Q. After you had written this, then Mr. Davis presented it to him for his signature, is that right?

A. Yes, sir, and asked him first to read over the statement.

Q. Asked him to sign it?

A. Asked him to read over the statement and then if it was correct, to sign it.

Q. There was no detailed discussion about this accident particularly, was there? All you say here, "There was no defective equipment." There was no detailed discussion?

A. There was a discussion, we merely asked how the accident occurred and this discussion took place prior to the time that the statement was taken.

(Testimony of Martin Packard.)

Q. Can you recall briefly what he said at that time as to how his accident happened?

A. Briefly, he stated he was working on the SS Goucher Victory and that while working with some timbers a timber slipped and fell on his third and fourth fingers of his hand, crushing them.

Q. The timber slipped and fell on his hand?

A. Yes, sir.

Q. And crushed his hand?

A. Crushed his fingers, sir.

Q. That is about as far as you went with reference to how he got his hand hurt, isn't that right?

A. Yes, sir, in the statement.

Q. In other words, that is your best recollection that this strongback—— A. He said timber.

Q. ——dropped and crushed his hand, is that right?

A. While working with the timber, it slipped.

Mr. Zabel: I want to renew my objection to this statement. He states that the timber dropped and crushed his hand. That was his recollection of the conversation, and we have a different statement, Your Honor, stating that his hand got caught or something to that effect, nothing about dropping of the timber. It is at variance with what he recalled.

The Court: Do you wish to give the Court the benefit of any authority that supports your contention, where the written statement offered is at variance with the witness' recollection of the subject

(Testimony of Martin Packard.)

of it, that that excludes or supports exclusion from evidence of the writing?

Mr. Zabel: I have no cases to present, Your Honor. [166] But he has stated that everything was written down just as it was stated. He has so stated, and now in his recollection he states something different than what appears in the statement.

The Court: Do you wish to make any response to the objection?

Mr. Franklin: No, if the Court please. The witness has identified the statement as having been an accurate summary of the conversation carried on between Mr. Dillon and himself relative, among other things, as to how the injury occurred, for possible purpose of third party liability.

He has stated that it was written down carefully, that the proposed exhibit accurately reflects what was written down, that those statements are true, that they were read over by Mr. Dillon, signed by Mr. Dillon, he has identified the signature, and that there were no changes requested by Mr. Dillon. I think counsel's argument merely goes to the weight of the evidence rather than to its admissibility.

The Court: The objection is overruled. Respondent's Exhibit A-1 is now admitted.

(Respondent's Exhibit A-1 received in evidence.) [167]

(Testimony of Martin Packard.)

RESPONDENT'S EXHIBIT A-1

9/17/46, Seattle, Wash.

My name is Alfred Dillon of 214 17th No. in Seattle. Birth date 6/8/89. I've been longshoring 33 years. I'm presently single, but have 2 children, Agnes Eliz. Anderson and Wm. L. Dillon, both of New York. Both are married and neither is a dependent. Thus I have no dependents.

My injury occurred May 13, 1946 aboard the SS Grouch Victory. I was placing a beam in the keeper and reached out to rehook the beam. The beam dropped into place but my right hand was in the way. I crushed three fingers.

I'm presently under medical treatment by Dr. Smith and receive treatments for physiotherapy from Elsie Childs. I'm still unable to work for the healing process is slow.

There was no defective equipment. I was not injured except as to my right hand.

The above is true and correct in its entirety.

/s/ ALFRED DILLON.

Admitted June 24, 1949.

The Court: I believe counsel for respondent had indicated already that his direct examination of the witness was concluded. I ask counsel for libelant if he wishes to proceed with cross-examination of the witness?

(Testimony of Martin Packard.)

Mr. Zabel: I have completed my cross-examination in the interrogation, Your Honor.

Mr. Franklin: We have nothing further. May Mr. Packard be excused?

The Court: Is there any objection on the part of the libelant?

Mr. Zabel: No objection, Your Honor.

The Court: You may be permanently excused from further attending this trial as a witness.

(Witness excused.)

Mr. Franklin: If the Court please, bearing in mind the time element, the respondent desires to introduce in evidence the deposition of Frank Palmer which was taken pursuant to notice on written direct interrogatories. The original is in the files of the Court.

I might state to the Court that this deposition of Mr. Frank Palmer was taken at Sunnyside, Washington, pursuant to written notice and serving of direct interrogatories upon the parties and no cross-interrogatories were served.

DEPOSITION OF FRANK PALMER

“Interrogatory No. 1: State (a) your name, (b) age, (c) present residence, and (d) present occupation.

Answer: (a) Frank Palmer, Jr., (b) 35 years of age, (c) Sunnyside, Washington, and (d) insulation salesman.

Interrogatory No. 2: Were you ever a member

(Deposition of Frank Palmer.)

of the crew of the SS 'Goucher Victory' during the year 1946? A. Yes.

Interrogatory No. 3: If so, state the approximate date of service aboard the vessel.

A. From the early part of February, 1946, to about June 1st, 1946.

Interrogatory No. 4: Please state the approximate age of the SS 'Goucher Victory' when you served aboard her.

A. I do not think the ship was over one year old.

Interrogatory No. 5: State if you ever served as Assistant Electrician on the SS 'Goucher Victory.' A. Yes.

Interrogatory No. 6: If so, state for what period of time.

A. From some time in the month of April, 1946, until the time I ended my employment about June 1st, 1946. [169]

Interrogatory No. 7: What was the name of the Chief Electrician? A. Jim Steele.

Interrogatory No. 8: What duty did the Chief Electrician and yourself have in connection with the maintenance and repair of the winches?

A. We were supposed to keep them in working condition at all times.

Interrogatory No. 9: State what type of winches were installed aboard the 'Goucher Victory.'

A. Electric winches.

Interrogatory No. 10: Referring to the evening of Monday, May 13, 1946, state (a) where the vessel

(Deposition of Frank Palmer.)

was moored, and (b) whether the vessel had a voyage in contemplation to a foreign country, and if so, to what country?

A. (a) At Seattle, Washington, and (b) we just came in from Yokohama, Japan, and the vessel was supposed to be going back to Yokohama, Japan.

Interrogatory No. 11: State what work was being carried on upon the vessel on Monday evening, May 13, 1946, and by whom.

A. Unloading cargo by stevedores.

Interrogatory No. 12: Where was Mr. Steele that evening?

A. He was off of the ship and I do not know where he was at.

Interrogatory No. 13: Where were you?

A. On board ship.

Interrogatory No. 14: How long did you remain aboard the vessel that evening of May 13th, 1946?

A. I was there all night.

Interrogatory No. 15: State if at any time you were aboard the vessel that evening, an accident was reported to you as occurring to a stevedore at No. 1 winch, which is supposed to have happened at approximately 9:30 p.m. A. No.

Interrogatory No. 16: State if that evening you were called upon to make any repairs to No. 1 winch? A. No.

Interrogatory No. 17: If so, state what they were. A. None.

Interrogatory No. 18: State if any complaints were made to you by any of the stevedores relative

(Deposition of Frank Palmer.)

to the functioning of No. 1 winches on the evening of May 13, 1946? A. No.

Interrogatory No. 19: State approximately when the vessel left Seattle and for what port.

A. We left after the vessel was loaded, probably about a week later for Yokohoma, Japan. [171]

Interrogatory No. 20: State if after the vessel left Seattle and until you got off the vessel on its return to Seattle, you made any repairs to No. 1 winch at any time after May 13, 1946.

A. Oh, we always greased them and saw that they were in working order. We had no special repairs to No. 1 winch.

Interrogatory No. 21: What use of No. 1 winches were made on the voyage to Yokohama and return?

A. It was used over there to unload cargo. No. 1 winches were used on this voyage same as other winches.

Interrogatory No. 22: Did you observe No. 1 winch in operation on the voyage from Seattle to Yokohama and return? A. Yes.

Interrogatory No. 23: If so, state from your observation how No. 1 winches operated during this period.

A. Oh, it was used to raise and lower gear and unloading cargo same as other winches on vessel."

Mr. Franklin: Respondents offer in evidence the deposition by interrogatories of Frank Palmer.

The Court: That deposition is received as part of respondent's case in chief.

Mr. Franklin: Respondents desire to introduce in [172] evidence deposition of James A. Steele.

The Court: The deposition of James A. Steele may now be read.

Mr. Franklin: This deposition, may it please the Court, was taken at San Francisco, California, August 20, 1948. At that time, Mr. Poth represented Mr. Dillon. There was no representation on behalf of Rothschild International Stevedoring Company. Mr. Ransom represented the respondents.

DEPOSITION OF JAMES A. STEELE

“Examination by Mr. Ransom:

Q. Will you give your full name for the record?

A. James A. Steele.

Q. And what is your present address, Mr. Steele?

A. 1810 Addison Street, Berkeley, 3, California.

Q. Where are you employed?

A. Colgate Palmolive Peet Company, Berkeley.

Q. What is the nature of your employment there? A. I am maintenance electrician.

Q. What if any sea experience have you had?

A. I have had three voyages as chief electrician on the Goucher Victory, and previously, from 1933 to 1937 for the Dollar Lines.

Q. Well when did you join the Goucher Victory, do you recall? [173]

A. December 24, 1945.

Q. How many voyages did you sail on her?

A. Three.

(Deposition of James A. Steele.)

Q. And do you recall about when you were discharged from the Goucher Victory?

A. About July, 1946.

Q. And in what capacity did you sail?

A. Chief electrician.

Q. On the Goucher Victory, Chief Electrician?

A. Yes, Chief Electrician.

Q. What experience have you had in electrical work?

A. Well, prior to that time, I held a journeyman's electrician card since 1942. Prior to that time, having worked for the Panama Canal and various local contractors, and the United States Navy. I think about two years as a Marine electrician, leaderman in shipyards, Kaiser shipyards.

Q. In Richmond? A. In Richmond.

Q. As the chief electrician on the Goucher Victory, what were your duties?

A. To maintain all the electrical equipment in good condition, perform any repairs that are necessary, and generally observing the condition of it, ordering the stores, the electrical stores, directing the activities of the second electrician. [174]

Q. Were you aboard the vessel in that capacity for each of the three voyages referred to?

A. For all of them, yes.

Q. What type of winches are there—strike that. What type of ship was the Goucher Victory?

A. Well, it was a Victory, converted to a troop transport.

(Deposition of James A. Steele.)

Q. And do you have any idea what her age was at the time you were aboard her?

A. Well, it was reported to me that it had been in operation about six months. It had made either, I think, two or three previous voyages across the Atlantic.

Q. You only know that from scuttlebut, do you?

A. That's right.

Q. What type of winches were aboard the Goucher Victory?

A. They were General Electric unit winches.

Q. No steam winches?

A. No steam winches.

Q. And did you have any duties with respect to the winches?

A. It was my job to take care of them entirely; that is to say, to maintain them and to perform any repairs or adjustments that were necessary.

Q. And did you have any assistance in that work or [175] were you alone?

A. I had an assistant electrician, yes, a second electrician.

Q. What was his name, do you recall?

A. Well, I had three of them, and the last one, let's see, I think it was Calmer. The one previous was Stanley—I forget the names of the other two.

Q. What examinations did you make of the winches as part of your duties?

A. I closely observed them in operation, although I did examine the electrical gear while the

(Deposition of James A. Steele.)

ship was at sea. But there was no other way to observe the mechanical operation except to watch them while the deck crew or the stevedores were using them, since they have to be operated with a load on the winch, to be operated normally.

Q. And during the time that you were aboard for your three voyages, what if any defects did you observe in the winches used in connection with the number one hatch?

A. I never observed any defect at number one.

Q. Are you quite sure of that?

A. Yes, none at all at number two.

Q. As a troop ship, were the winches used more or were they used less than the ship operating as a cargo ship?

A. A great deal less.

Q. If any defects or trouble were noted in the use [176] of the winches, to whom would such occurrence be reported?

A. It should in all cases eventually be reported to me, as chief electrician.

Q. By "eventually," what do you mean?

A. Well, it could be reported by whoever observed it to his immediate superior, who in turn might have reported it to my superior; in any event the report should reach me.

Q. While you were aboard the Goucher Victory, did anyone at any time ever report any defect in or trouble with the winches located at number one hatch?

A. No.

(Deposition of James A. Steele.)

Q. I am referring to any of the winches used in connection with any loading or discharging operation relative to number one hatch. Do you understand that?

A. Yes. No defect whatever was reported about number one hatch.

Q. Were you aboard the vessel on May 13th, at the time the vessel was at the port of embarkation at Seattle? A. Yes.

Q. Had the vessel been in that shipyard some time prior to that time, do you recall?

A. Yes, it had been to the shipyard for several weeks. I forget what work was being done.

Q. Was any work at that time being done on the winches, that you know of? [177]

A. No, not on the winches.

Q. And do you know whether the winches were operated during that time?

A. I couldn't say for certain. Probably they were, but I couldn't say for certain."

The Court: We will have to take a recess during the noon hour. Court will be in recess until 2:00 o'clock.

(At 12:00 o'clock p.m. Friday, June 24, proceedings recessed until 2:00 o'clock p.m., Friday, June 24, 1949.)

June 24, 1949, 2:00 o'Clock P.M.

The Court: You may proceed with the case on trial.

(Deposition of James A. Steele.)

Mr. DuPuis: Mr. Franklin asked if I would initiate the examination of Dr. Buckner.

The Court: You may do that. [178]

* * *

“Q. Did you receive any reports of trouble with the winches during that time?

A. No. [191]

Q. Where did the ship go after leaving the shipyard?

A. It moved over to the port of embarkation in Seattle.

Q. What occurred there?

A. Well, they loaded ship stores for, oh, probably two or three days, and then took the troops aboard and left out for Yokohama.

Q. Were you aboard during the loading of the troop stores? A. Yes.

Q. Were any stores loaded to number one hatch, number one hold?

A. Yes, practically all of them were unloaded at number one.

Q. Did you observe at any time in connection with that loading of stores?

A. Yes, I have watched them.

Q. What did you observe?

A. That everything was working good.

Q. Did you observe any defects in the braking of the winches?

A. No, it stopped on the lowering. Stopped

(Deposition of James A. Steele.)

with the load on the hook while the hook was lowering.

Q. During the loading of these stores at Seattle in this period of time, did you receive any reports concerning any trouble with or any defects with respect to, the winches [192] at number one hatch?

A. Never had any reports to that effect.

Q. Did you have any reports of any trouble or defects in connection with the winches at the number one hatch after loading at Seattle?

A. No.

Q. Did you know an Alfred L. Dillon, who is the libelant in this case?

A. No, I did not.

Q. Did you ever see any accident to him?

A. No, I did not.

Q. Or to any man known by you as that name?

A. No, I never saw any accident while I was aboard.

Q. Never saw any at all? A. No.

Q. Did you receive a report of an accident to an Alfred L. Dillon?

A. Never received any report.

Q. And during this loading at Seattle, did you have occasion to observe the brake lining of the winches at number one hatch?

A. Well, they are in plain view at all times, so that I looked at them periodically; and there was no evidence of any wear.

(Deposition of James A. Steele.)

Q. In other words, from your observation, you didn't [193] observe any wear?

A. They seemed to be tight and didn't seem to be worn. Of course my purpose in observing them was to see if they needed tightening.

Q. And from your observation, you concluded that they did not need tightening, is that right?

A. That is right.

Q. And did you ever tighten them while you were aboard? A. Never tightened them.

Q. Did you ever receive any requests to tighten them? A. Never received any.

Q. What brakes did the winches have?

A. They had a large automatic brake, spring operated, electrically released. They had a foot treadle operating a brake, but I don't recall whether that was a separate brake or the same brake.

Q. Do you recall whether or not there was any defect in the automatic brake of the winches to number one hatch which would prevent you from tightening that?

A. No, they were in good condition.

Q. Prior to going into Seattle, when had the winches at the number one hatch last been operated, do you know?

A. Well, they were used during the voyage, but I don't remember exactly when. [194]

Q. That is, they had been used after leaving port?

(Deposition of James A. Steele.)

A. Yes, and they had been used in Yokohama to load additional stores.

Q. So far as you know, were they operating properly in those uses? A. Yes.

Q. Following leaving Seattle—strike that. How long after loading at the port of embarkation, do you recall, was it before you sailed?

A. Well, it was probably two days at the longest. In other words, at the termination of loading of ships' stores, we loaded the troops and probably that would take one day, and then we sailed.

Q. Where did the vessel go then?

A. To Yokohama.

Q. And were the winches at the number one hatch used at Yokohama?

A. Yes, they were used there.

Q. Did you observe their use there?

A. Yes.

Q. Did you observe any defects in their use or operation?

A. Well, they seemed to be working all right.

Q. Did you have any reports of any trouble with the winches at Yokohama? [195]

A. No.

Mr. Ransom: That is all.

Examination

By Mr. Poth:

Q. How many hatches were there on the Goucher Victory? A. Five.

(Deposition of James A. Steele.)

Q. And how many of them were fitted out for carrying troops on the 13th day of May of 1946?

A. Parts of number one and all of number two.

Q. All of number two?

A. Yes. Part of number three and part of number four.

Q. What about five?

A. No, five was for mail.

Q. Five was for mail? A. Yes.

Q. Now number two, then, took no cargo at all?

A. No cargo at all.

Q. So the cargo hatches were numbers one, three and five?

A. Yes. Well, there was little or nothing handled through number three, just a few things might have been set in there; but actually no stores were in number three.

Q. And you say ships' stores were customarily loaded in number one? [196]

A. Number one.

Q. Were ships' stores placed in the other hatches also?

A. No, there was a little bit of departmental stores were set down in the main deck and carried into various storerooms, but the actual ships' stores in bulk quantity were loaded in number one.

Q. Was there any heavy cargo, heavy pieces of cargo, loaded on the ship on the 13th or about that time? A. No heavy pieces, no.

Q. Or thereafter?

(Deposition of James A. Steele.)

A. All sling loads.

Q. Do you know what the average weight of the load of ships' stores were that were being stowed down in number one hatch on the 13th?

A. Well, I asked the chief mate that question one time, and he said that it was about a ton and a half, up to three thousand pounds.

Q. Wouldn't 1500 be more like it?

A. Well, now, I would be in no position to say. Sling loads—they vary quite a bit, depending on the shape of the packages, and so I wouldn't really be in any position to hazard a guess.

Q. Do you know whether the booms on the number one hatch were tested and then marked for tonnage? [197]

A. They were tested. I don't remember whether they were marked. I didn't see the marks. They may have been, but I didn't see them.

Q. Well, do you know what they tested out at?

A. I know what they tested them at, 7½ tons.

Q. 7½ tons?

A. But I didn't see those particular booms. But I have worked in the shipyard on Victory ships, and they test the 5-ton booms at 7½ tons.

Q. Now, what is supposed to be the safe limit for the brakes as in operation on number one hatch, as to tonnage?

A. It should stop when the hook is lowering at full speed, it should stop 7½ tons.

Q. 7½ tons?

A. Yes.

(Deposition of James A. Steele.)

Q. Do you know what the weight of one of these strong banks was in the 'tween decks of the number one hatch of the Goucher Victory?

A. I don't actually know the weight of those. I would put a guess at something a little under 1000 pounds. But I wouldn't be sure.

Q. You don't know?

A. I don't know, actually.

Q. How many winches were there on number one hatch of the Goucher Victory on the 13th day of May, 1946? [198]

A. Two, I think.

Q. Two?

A. (Witness nodded in the affirmative.)

Q. Where were they situated?

A. Just forward of number one mast house. That would be the aft end of the hatch.

Q. Were these winches operated by one winch driver or by two winch drivers?

A. Well, normally they are operated by one, but they can be operated by two.

Q. These are with levers attached so that one man could operate both of the winches?

A. The two controls were stationed at the center of the hatch coaming, so that they could be operated by one winch driver.

Q. Now, what type of winches did you say these were?

A. General Electric unit winches.

Q. And what turned the winch drum around?

(Deposition of James A. Steele.)

A. It turned by 30 horsepower electric, direct current electric motor.

Q. Now, was that motor on the outside or the inside of the winch drum in relation to the ship's rail?

A. Well, the winches were positioned angularly, and I would state from my recollection of it, it was toward the outside, forward and outside. [199]

Q. In other words, it was on the outboard side of the drum, not on the inboard side of the winch drum?

A. I don't remember whether it was or not.

Q. Were these motors covered?

A. Oh, yes, they were waterproof motors.

Q. What kind of covering was over the motors?

A. Cast iron housing, with gaskets.

Q. Was this covering square or circular in shape?

A. Well, it was, I would say, hexagonal more—of course it was an irregular shape in order to cover the motor.

Q. Did you ever take one of the motors down on either of the winches on number one hatch while you were aboard the vessel?

A. I have taken the housing off; you have to take it off in order to service the brushes of the commutator.

Q. When was it that you did that?

A. That was at sea, returning from Yokohama.

Q. What was the occasion for doing that?

(Deposition of James A. Steele.)

A. Regular service procedure. We service all of them in order to look at the brushes and the length of the brushes and the condition of the commutator; the housing must be removed.

Q. Did you do that just as a matter of course every so often whether they needed it or not? [200]

A. Whether they need it or not, yes, sir. In other words, in order to detect any difficulties before they arose.

Q. Would you please describe the mechanism known as the automatic brake? As was present on the winches on number one hatch on the Goucher Victory?

A. Well, it was an external contracting brake, consisting of two bands,—they might be referred to as shoes—there was a one-inch pin in the bottom and the tops were drawn together by a large spring and the central portion had a shaft that connected to a solenoid. The spring operated the brake and the solenoid released it, so the brake was held on by spring pressure when the power was disconnected.

Q. Now, you mentioned on each winch, then, there were two brake bands, is that correct?

A. Two brake bands, yes.

Q. And in relation to the drum of the winch, there were these brake bands affixed?

A. They were affixed at the bottom, and the solenoid at the top.

Q. What is the solenoid?

(Deposition of James A. Steele.)

A. It is the electric coil that drives the brakes to an off position, an open position, opens them, releases them. [201]

Q. Was there any mechanism for adjusting these brakes? A. Yes.

Q. Where was that mechanism situated?

A. Well, it was situated at each point, and there was one on top and some adjustment could be made through the linkage to the solenoid.

Q. Well, now what did these brake drums rub on to?

A. The band rubbed a drum, a large drum.

Q. Were there two drums?

A. No, just one.

Q. There were two brake bands, one alongside the other, is that it?

A. No, they contracted in this way on one drum (indicating).

Q. Oh, on one drum, but you had one circling around, is that right?

A. Yes, one drum. The two bands mostly consisted of two linings contracting on one drum, one on each side, fastened at the bottom.

Q. Now, where was this drum in relation to the portion of the winch drum that the cables coiled on and up, was it inboard or outboard?

A. On that winch, the winches on number one, I don't recall whether it was inboard or outboard. The winch set at an angle. Now, let's see, what would that be considered? [202]

(Deposition of James A. Steele.)

I would say it was outboard.

Q. Outboard?

A. I forget now just exactly how they sat. It seems to me, my recollection of it is, that the brake drums were on the outboard side.

Q. Now, was there a covering or a case placed over the brake mechanism? A. No.

Q. It was out in the open?

A. Right out in the open, yes.

Q. What type of mechanism was placed there for adjusting the brake, was it a screw or bolt or not?

A. Yes, nuts and jam or screw threads.

Q. And you say there were two of those nuts, one on top and one on the bottom?

A. Yes, on the main linkage there were two on one staff.

Q. What do you mean by main linkage?

A. That is the linkage at the top where the principal portion of the operation takes place.

Q. Well, would you please describe what the main linkage is? What does it look like?

A. Well, it consists of a pin—now, let me think. There are several pieces to it. I couldn't describe it in detail to you. There are too many pieces involved. [203]

Q. Well, do the best you can, then.

A. However, it operates on the top or open side of the band to draw the two bands together, and it is a pulling action exerted by the spring. The

(Deposition of James A. Steele.)

spring setting against the ear on one hand and pulling the ear of the other band up to it.

Q. What were these brake bands made out of, if you know? A. Steel.

Q. Steel? A. Oh, the bands?

Q. Yes, the bands. A. The lining?

Q. The lining. A. You mean the lining?

Q. Yes.

A. The bands were steel, the linings were hydraulic material, brake lining material.

Q. Was it the same——

A. Standard brake lining material.

Q. Was it the same kind that is used in automobiles and trucks?

A. That kind of brake lining material, yes, sir.

Q. Did you have occasion ever to replace any brake lining aboard that vessel? [204]

A. No, sir, I never had to replace any on that.

Q. Did you have any in stock?

A. Yes, we had a spare brake, as a matter of fact.

Q. Did you ever test the braking power of the brakes on the number one hatch at the time?

A. No, I wasn't in a position to be able to do that, because as I said before, in order to test it, you have to have a load on the hook, and I was in no position as chief electrician to do that.

Q. Well now assume that the brake bands are set up to stop the lift on 7½ tons, and assume that you are picking up a load of 8 tons, and you stop the load. What will happen? Will it slip?

(Deposition of James A. Steele.)

A. Well, 8 tons?

Q. Well, let's say 9 tons or 10 tons.

A. You mean, if you put enough load on to make it slip, would it slip?

Q. Yes.

A. Yes, if you put enough load on to make it slip, it would slip. In other words, its holding point isn't infinite, it takes a certain load, but then there is a saturation point beyond which it wouldn't hold. There is of course a great danger that the lines would part before the brake slipped. However, a person could try and see which took place first. [205]

Q. Now do you recall whether or not the foot brake was in working order on the number one hatch?

A. Yes, it was in working order. I will say that the foot brakes, though, were very mediocre——

Q. Generally, not much good?

A. Well, they would not stop. They might slow it up a little, but they would not stop it. They were designed that way on purpose, they tell me. What the purpose is, I don't know but at any rate they were designed so that they wouldn't hold much, and they don't.

Q. Well, it is a matter of common notoriety that foot brakes on Victory ships aren't much good?

A. They don't hold very good, no.

Q. Now it is possible to operate one of those

(Deposition of James A. Steele.)

winches when the automatic brake isn't working, isn't that right?

A. No, you might move it a few inches, but it would kick out the circuit breaker before it would go very far. In other words, it would load up the motor so hard that the motor couldn't handle that.

Q. The way that is done is that when you're slacking away on a load and you want to stop her, you put her in "go ahead" position, isn't that right?

A. Yes. In other words, in your lowering, you know those automatic electric winches are such that with no load on the hook, it will lower very rapidly automatically, and [206] as the load is on there, they have an automatic electrical dynamic brake. Now you see, they have another brake arrangement on there called a "dynamic" brake which is automatic and integral with the electrical switch affair, which is very complicated on those winches, and at any time the rope feed and the load exceed a certain predetermined value, the dynamic braking takes place and will slow it down; so with no load on the hook, a rapid lowering can be accomplished. But with a load on the hook, it couldn't be accomplished.

Q. Of course with that dynamic brake, you can't stop a load?

A. Oh, no, it merely holds it down to a certain value.

Q. How much of a job is it to tighten up the

(Deposition of James A. Steele.)

bands on one of those winches? That is, on the automatic brake?

A. Oh, I would say it might take two men to do a good job, about an hour and a half.

Q. And did you ever tighten up any of the brakes on the other hatches on the vessel?

A. Not on the Goucher Victory, no.

Q. Do you know what the normal lifetime, according to hours of operation of brake linings on those automatic brakes is?

A. I have never heard that, no; it must be roughly a thousand or two hours, probably. I have never observed electric winches over a long period. I mean, after a long [207] period of years. They are a fairly recent acquisition. I have seen electric winches that have been operating a great deal after they have been operating for five years, and the linings haven't been replaced. The brakes had been tightened up, but the linings hadn't been replaced. Those were General Electric winches, incidentally.

Q. The brake lining behaves about the same way as it does on trucks and automobiles?

A. Yes, that's right.

Q. It has to be adjusted once in a while when they loosen up?

A. They loosen up, that's right. They have quite large braking surfaces in proportion to the load, so that they hold up quite good.

Q. And of course the looser a brake becomes, why the less the amount of tonnage it will stop as a rule?

A. That's right.

(Deposition of James A. Steele.)

Q. And it takes two men to tighten up one of these brakes? A. No, one could do it.

Q. What did you say your assistant's name was on the 13th day of May aboard the Goucher Victory—in 1946—was that Calmer?

A. Yes, that was Calmer, uh-huh.

Q. Where was the vessel laying that day? [208]

A. It was at the port of embarkation.

Q. You don't remember which pier?

A. I have forgotten those pier numbers. It seems to me like it was 25, but I couldn't say for sure.

Q. Were you aboard the vessel during all the hours on the 13th day of May? A. No.

Q. What hours were you off the vessel?

A. I was off from five o'clock in the evening until about 10:30.

Q. About 10:30 p.m.? A. Uh-huh.

Q. You were uptown? A. Yes.

Q. And do you know whether or not your assistant, Calmer, was aboard the vessel between the hours of 5 p.m. and 10:30 p.m., on the 13th day of May, 1946? A. Yes, he was aboard.

Q. And did he make any report to you about doing any work aboard the vessel during that time that you were gone on that day?

A. No; after 5 o'clock the electrician is in stand-by duty and only performs work that he is called to do, and he hadn't been called.

Q. You don't serve regular watches when you

(Deposition of James A. Steele.)

are [209] aboard a vessel like that in the capacity of electrician?

A. The maintenance men serve daytime—they work daytimes.

Q. 8 to 5?

A. But if any deck gear is in use, then they have what they call “stand-by time.” Then one man is aboard. If they work the winches all night, he stays aboard. I mean he stays at stand-by. He is up and dressed. He isn’t just aboard, you see, because naturally they all live there, but he is available for work then, however, he doesn’t work unless he is called on. Of course he checks on the things, but he doesn’t perform any work unless some condition exists that he is called upon to fix.

Q. Do you keep any record of the work that you do aboard the vessel?

A. No, I don’t keep records. Not only electrical, but it is the maintenance proposition.

Q. For example, if you are called to repair a motor or dynamo or do any electrical job aboard the vessel, you don’t write down any written work?

A. Well, if it were done after regular daytime hours, there would be a record kept for the purposes of paying overtime. Otherwise——

Q. What sort of a record is that?

A. Well, it is kept by the first assistant engineer, [210] and I don’t know if it has any name. I don’t know what it is.

Q. Do they have printed forms you fill out?

(Deposition of James A. Steele.)

A. There is a printed form he fills out. The electrician doesn't fill it out, the electrician turns in a report to the first assistant engineer and he logs it up in some form.

Q. Is the nature of the work performed listed?

A. That is listed.

Q. It is filled in in that report?

A. That's right.

Q. For example——

A. It says so many hours spent doing such and such a thing to such and such equipment.

Q. Do you know whether Calmer was aboard when you were gone?

A. Yes, he was aboard.

Q. When you were gone?

A. Yes, he was aboard.

Q. Did you see him before you left?

A. Yes.

Q. Did you see him when you got back?

A. When I got back, yes.

Q. Where was he when you got back?

A. He was in our focsle. We lived together. He was [211] still in his work clothes. He had signed on as assistant electrician.

Q. That day?

A. No, it was a little prior to that, probably—well it was in the middle of the week. Maybe it was Wednesday or something like that of the previous week. I have forgotten the exact day, the signing on day. At any rate, he asked to be allowed to stay

(Deposition of James A. Steele.)

aboard to take care of those things in order to familiarize himself with the equipment. That being all right with me, I let him do the staying.

Q. You say you left the vessel in July?

A. Yes.

Q. You left subsequent to the 13th day of May, 1946?

A. Uh-huh.

Q. The vessel left the port at Seattle and proceeded to Japan, is that correct?

A. Yokohama.

Q. Yokohama?

A. Yes.

Q. And in Japan you discharged ships' stores?

A. No, we discharged troops and took on ships' stores.

Q. Well, you used the ships' stores?

A. To feed the troops.

Q. You used it all up? [212]

A. Well, not all of them, but we used a fairly good portion of them, so we took on some additional ships' supplies.

Q. Some additional ships' stores?

A. Uh-huh.

Q. And then you returned to Seattle?

A. That's right.

Q. And did you leave the vessel in Seattle on her return?

A. Well, not immediately, but after a few weeks.

Q. Where was the vessel after her return to Seattle from Yokohama?

A. Well, when it left the port of embarkation, it went over to—I have forgotten those pier num-

(Deposition of James A. Steele.)

bers, but at any rate it is up there on some island. They call it—where the rice milling companies are up there.

Q. Harbor Island?

A. Yes. They stayed there a short time and then they moved to the other side of the—let's see, what are the names of those now? It is so close to the main section of town and to the north side from where we had been, on the main section. Some company there was using that pier to do some ship repairs, and they were going to do a few things with this ship.

Q. Well after you loaded ships' stores in Japan, in Yokohama, were the winches ever used again on number one [213] hatch when you were aboard her?

A. Yes, all the winch gear, and by "Gear" I mean the lines and the pulleys and the fair leads and all that sort of thing; they were all gone over by the deck department as a maintenance measure on the return voyage.

Q. But was any cargo or ships' stores or anything loaded or discharged from the vessel?

A. No, nothing loaded. They moved some paint, but they didn't load anything.

Q. By use of the winches, they moved paint from number one? A. Yes.

Q. That is, number one hatch. Well then at no time did you have an exact knowledge of the actual brake test power of the automatic winches on number one hatch on the vessel?

(Deposition of James A. Steele.)

A. No, sir, no such tests were available. And no such test is made. The only test that is ever taken after the ship is commissioned is just the test of normal usage. In other words, the Bureau of Inspection and Navigation inspects various things, but they do not test the deck gear. They test them in the shipyard before the ship is commissioned and that is the last test it gets.

Mr. Roth: I have no further questions.

Mr. Ransom: I have just one or two. [214]

Further Examination by Mr. Ransom

Q. I want to be sure this brake situation is straight in the record. As I understand it, there is a dynamic braking power in the winches, and in addition there is an automatic brake, and in addition to that there is a foot brake?

A. That's right.

Q. Is that correct? A. Yes.

Q. The dynamic braking power is a slowing rather than a stopping power, is that right?

A. That's right.

Q. The automatic has a stopping power?

A. That's right.

Q. And the foot brake may be either a stopping or a slowing power, but is generally used as a slowing power, is that right? A. That's right.

Q. When you are on stand-by, are you paid stand-by wages of some sort?

A. Yes, overtime rate they call it.

(Deposition of James A. Steele.)

Q. Well then if you do work while you are on stand-by, is your wage scale different from the ordinary stand-by?

A. No, it wasn't at that time.

Q. Well then in fact if you did work, would there be [215] an entry of any work that you would do during stand-by?

A. Very possibly not, if it was done during stand-by hours. On the practical side, probably what would happen if there was something broken down, only emergency measures would be taken during the stand-by hours, and then any repairing that would take place would take place then on the following regular day shift, and some of those, if it was repairing, would be made at the overtime rate even if performed during the daytime hours. So as such, it would have to be written up in order to collect for it.

Q. To your recollection there was no repairing following May 13th on number one winch?

A. No, not on number one.

Mr. Ransom: That is all.

Further Examination by Mr. Poth

Q. Do you know how to drive a winch?

A. Yes, I am not an expert at it, however.

Q. Well let's see, on these winches here, when you want to come back on the winches, that is to lower away, slack away, which way do you put the controls, toward the hatch or away from the hatch?

(Deposition of James A. Steele.)

That is on the number one hatch of the Goucher Victory?

A. On number one—you know, I never used number one winches at all. I used number five, and I suppose [216] that the controllers worked in the same direction. In that case, the lowering direction was back away from the hatch. Yes, that's right, back away from the hatch. But that is the only winch on the Goucher Victory I used, the ones on number five. I would assume that number one was the same, but I couldn't guarantee it.

Q. Is it possible to set the brakes too tight? On one of these automatic winches?

A. Yes, it is.

Q. What will happen if you set them too tight?

A. Well the motor will heat up and kick the breaker off, and then throw the whole thing off the line and it will just stand there and do nothing.

Q. Now isn't it possible to test the braking power of one of these automatic brakes, by, say, loading up a cargo board with a definite amount of weight and then picking it up off the deck and then lowering it away and stopping it?

A. That is the way it is tested. It is lowered and then the power is thrown off and when the power is thrown off the brake is automatically applied and that is the way it is tested at the shipyards before the ship is commissioned. Of course that is the continuous test in handling loads, when you throw the power off, how quick it stops your sling load. [217]

(Deposition of James A. Steele.)

Q. You never made any such tests while you were aboard? A. No.

Q. You didn't see any tests?

A. No, when they had a load on the hook, an authorized winch driver must handle the winch. So I have watched them handle the loads, but I wasn't allowed to handle them myself.

Q. When these ships' stores were being loaded, were they being loaded with cargo boards? Were the stores placed on boards, or were they loaded with net slings?

A. They had cargo boards for use on certain stores and nets for use on other stores.

Q. What type of stores were the nets on?

A. Well I know they used nets on cased goods, and the paint came in on a net sling, if I remember right. I wouldn't say what else. In fact, I don't remember exactly which stores were coming in there or what they came in on.

Q. Do you remember what they used in Japan, whether they used cargo boards or net slings?

A. Well let's see. In Japan I think they used nets. Now I am just going from a hazy recollection, but it doesn't seem to me that they had any boards there. I think they had to use nets.

Q. And who did the longshore work, American soldiers [218] in Japan or the Japanese?

A. No, the Japanese longshoremen.

Q. And once again, on all of the time that you were aboard the vessel, you did not tighten the brakes on any of the winches?

(Deposition of James A. Steele.)

A. I was never called on to make any adjustments.

Q. Well did you ever make any such adjustments?

A. No, I did not ever make any such adjustments.

Mr. Roth: I have no further question.

Mr. Ransom: That is all."

Mr. Franklin: If the Court please, respondents offer the testimony of James A. Steele.

The Court: That deposition is received in evidence as a part of respondents' case-in-chief.

Mr. Franklin: Respondents desire to introduce in evidence the deposition of Kristian Bauer. This deposition, may it please the Court, was taken at Seattle, Washington, August 18, 1948, on behalf of respondents. I was present, and Mr. Poth, Mr. Zabel's associate, was president.

DEPOSITION OF KRISTIAN BAUER

"Direct Examination

By Mr. Franklin: .

Q. Would you state your name, please? [219]

A. Kristian Bauer.

Q. Where do you live, Captain Bauer?

A. 517 - 59th S. E., Auburn. That is my mailing address.

Q. How old are you, sir? A. 71.

Q. How long have you been going to sea?

A. 56 years.

(Deposition of Kristian Bauer.)

Q. What type of ships did you begin to sail on?

A. Square rigged ships.

Q. Have you sailed on steam vessels, too?

A. Yes.

Q. When did you begin sailing on steam vessels?

A. In 1927.

Q. What licenses do you hold?

A. Master.

Q. How long have you held a Master's license?

A. Master of sail since 1918, and Master of steam since 1928 or 1929—in January.

Q. At the present time, are you attached to any vessel? A. No.

Q. Are you planning to take the first available assignment, or are you planning on returning to sea in the near future?

A. If one of these company ships needs a man, I will [220] go, but I am not planning.

Q. Mr. Bauer, were you ever stationed aboard the steamship Goucher Victory? A. Yes.

Q. Approximately when did you join her?

A. Well, that I don't know. It was somewhere in the first part of May—no—I think it must have been the 6th of May,—the 6th or 8th of May. I don't remember for sure, because I left another ship and they told me to take a week off and come back and join the Goucher Victory.

Q. What type of ship was the Goucher Victory?

A. It was a Victory ship. It was out as a troop carrier.

(Deposition of Kristian Bauer.)

Q. In what capacity did you join the Goucher Victory? A. Chief Mate.

Q. When you first joined the Goucher Victory, where was the vessel then lying?

A. In the West Waterway, at the Puget Sound Bridge and Dredging Company.

Q. What was being done to her?

A. They were overhauling the troop quarters; repainting and cleaning the troop quarters.

Q. After that was done where did the vessel proceed to?

A. To Pier 36 or Pier 37—I don't remember which. [221]

Q. The Army Port of Embarkation?

A. Yes.

Q. For what purpose?

A. To take on stores and troops.

Q. What kind of stores were you taking on?

A. Well, meat and vegetables, and all kinds of provisions for the troops.

Q. About how many troops did you carry?

A. I don't remember for sure, but I think it was about 2300.

Q. Where were you bound for?

A. Yokohama.

Q. Mr. Bauer, do you remember about what time the vessel left the Puget Sound Bridge & Dredging Company and docked at the Army Port of Embarkation?

A. As far as I remember it, Friday afternoon,

(Deposition of Kristian Bauer.)

on the 10th. Or it could have been Saturday morning—but I think it was Friday, on the 10th.

Q. On the 10th of May, 1946? A. Yes.

Q. During the time you were aboard the vessel over at the Puget Sound Bridge and Dredging Company dock, what kind of winches were aboard the Goucher Victory? A. Electric winches.

Q. And there were how many hatches in the Goucher [222] Victory?

A. There were five, but there were two sets of winches.

Q. How about No. 1?

A. They only had one set.

Q. One set of electric winches? A. Yes.

Q. While the vessel was lying at the Puget Sound Bridge & Dredging Company dock, was any use made of the electric winches at No. 1 hatch?

A. As I remember it, they had the heavy pontoon hatches. They were off. They used the winches to take them off and put them back on.

Q. Did you have occasion while that work was being done at No. 1 hatch, to observe the cargo operations of the electric winches at No. 1 hatch?

A. I didn't pay any special attention to it, but if there had been anything wrong with them I would have noticed it.

Q. Did you notice anything wrong in their operations? A. No.

Q. Did you notice anything wrong with the automatic brakes? A. No, sir.

(Deposition of Kristian Bauer.)

Q. Was there any deficiency reported to you in [223] connection with the automatic brakes, as Chief Mate? A. No.

Q. Were the winches under your supervision and control as Chief Mate? A. Yes.

Q. Do you remember the stevedoring company that loaded for the Army in May, 1946?

A. Rothschild, as far as I remember.

Q. Your testimony is that they began loading on Saturday, May 11, 1946? A. Yes.

Q. On that Saturday, May 11, 1946, how long were you on watch? When did you go on watch and when did you go off watch?

A. I really wasn't on watch, but I was on board up until about 10:00 o'clock in the forenoon. I really wasn't on watch, because Saturday and Sunday you are supposed to get off when you are in port. I really was not on watch, and there was nothing reported to me.

Q. During that Saturday you were on board the vessel, was the Rothschild Company using the gear at No. 1 hatch for use with No. 1 hatch?

A. Yes.

Q. What kind of stores were being placed in No. 1 hatch? [224]

A. Now, let me see—it was mostly case goods and green vegetables.

Q. You then left the vessel on Saturday about 10:00 a.m.?

A. Yes, I think I did. I couldn't be right sure.

(Deposition of Kristian Bauer.)

Q. Did the vessel load stores on Sunday, or do you know? A. No.

Q. Referring to Monday, May 14, 1946, approximately when did you return to the vessel?

A. Before 8 o'clock in the morning.

Q. How long did you remain on the vessel on Monday?

A. Until a little after 5:00 o'clock in the evening.

Q. Who relieved you then?

A. A Mate by the name of Louis Nuss.

Q. During the period of time from 8:00 o'clock a.m. to 5:00 p.m., were you in the vicinity of No. 1, of the winches at No. 1, the electric winches, from time to time?

A. Yes; I was there a few times.

Q. Did you observe any difficulty being experienced by the winch driver in stopping or handling those winches? A. No; none whatsoever.

Q. Did you observe any defective condition with the No. 1 winch which made them interfere with the proper stopping of the winches? [225]

A. No.

Q. Did you see the accident which occurred to a stevedore by the name of Alfred Dillon, at 9:30 that night? A. No.

Q. When did you first hear about that?

A. The next morning, when I came on board.

Q. Who advised you that Mr. Dillon had been injured? A. The night Mate.

(Deposition of Kristian Bauer.)

Q. Were any stevedoring operations conducted on the vessel on Tuesday, May 14, 1946, to your recollection?

A. I do not think they worked in No. 1. They took baggage aboard in No. 5, but I don't think they worked in No. 1.

Q. What occurred on Tuesday, May 14, 1946? Did you load troops on that day? A. Yes.

Q. Approximately what time did the vessel leave the Port of Embarkation on the evening of Tuesday, May 14, 1946?

A. Close around 8:00 o'clock.

Q. Where you bound for? A. Yokohama.

Q. On the way to Yokohama, did you have any occasion to use the electric winches at No. 1 hatch?

A. No; not out at sea.

Q. When you got to Yokohama, was any use made of the [226] electric winches at No. 1 hatch?

A. Yes. We discharged part of the stores, but we had more stores than were required to bring us back to the Coast, and the Army took what we had over, whatever we could spare—the Army took them ashore.

Q. Was No. 1 hatch used to discharge those excess stores? A. Yes.

Q. Did you observe the operation of the winches at that time at No. 1 hatch?

A. The winches worked all right.

Q. Were repairs affected on any part of those winches at any time on May 18, 1946?

(Deposition of Kristian Bauer.)

A. Not as far as I know. Of course the electricians could have worked on them, but there was nothing said to me about it.

Q. Would you have known if they were working on the winches?

A. Yes, I most likely would, if there had been any big repairs on it. Of course they tested all the winches during the voyage, but I don't remember them doing anything to them.

Q. Mr. Bauer, when you left Yokohama, where did you proceed?

A. Back to Seattle. [227]

Q. And then you arrived in Seattle approximately when in 1946—just approximately?

A. That would be in the first part of June.

Q. Some time in June, 1946? A. Yes.

Q. If you left Seattle on May 14, 1946, for Yokohama, how many days would it take you to cross?

A. I don't remember whether it was 11 or 12 days.

Q. And the same amount of time to return?

A. A day or so, more or less.

Q. Did you leave the Goucher Victory then?

A. Yes. I left her when the Army Transport Service took her over entirely.

Q. When was that?—can you tell us?

A. I think it was in the beginning of July.

Q. At any time until you left the vessel in 1946, to your knowledge, was there any defective condition of the electric winches at No. 1 hatch?

(Deposition of Kristian Bauer.)

A. No.

Q. You didn't see any?

A. I didn't see any.

Q. Mr. Bauer, do you waive the reading and signing of this deposition you have given here to-day, so that you will not have to return here and read and sign it? A. Yes. [228]

Mr. Franklin: Is that agreeable with you, Mr. Poth?

Mr. Poth: Yes.

Mr. Franklin: You may cross-examine.

Cross-Examination

By Mr. Poth:

Q. While you were aboard the Goucher Victory, was there anyone, any member of the crew, also aboard the vessel, who was qualified and capable of making repairs and adjustments to the winches aboard this vessel?

A. There were two electricians there.

Q. Did you at any time see them checking or adjusting the winches, while you were aboard the vessel?

A. I don't remember that I seen them in No. 1, but I noticed they were working on No. 2 one day.

Q. What day was that?

A. That I don't remember.

Q. Do you recall what they were doing to the No. 2 winch?

A. No. I think they were checking over the motors and brushes, and things like that.

(Deposition of Kristian Bauer.)

Q. Would you please describe the mechanism you have referred to as the automatic brake, in relation to a winch? [229]

A. Well, I don't know as I can. It is a brake. When the juice is turned on at the back, to either hoist or lower, then the brake goes on. It is a magnetic brake. When the juice is turned off the automatic turns that brake down tight.

Q. What do they clamp it on to?

A. Just bring it together tight around the drum. There is a regular brake band around the drum, and when the electricity is turned off, it automatically closes that brake, clamps it down tight on the drum so it cannot move.

Q. What kind of substance is this brake made of?

A. It is a steel band, like the brakes on an automobile. It works on the same principle.

Q. It had a brake lining?

A. It had a brake lining.

Q. Is that brake lining similiar to the brake lining used on automobiles?

A. Yes. I think it is the same kind of stuff.

Q. Did you ever see that brake lining on the automatic brake of a winch?

A. I never saw a brake taken off, to look at the inside of one of them, but as far as I could see, it was the same thing.

Q. Did that brake lining have to be replaced from time to time? [230]

(Deposition of Kristian Bauer.)

A. Maybe it would have to be.

Q. What operation would you take on the winch when the brake lining became worn?

A. Well, I imagine it would have a tendency to not hold as good as when it is new.

Q. Do you know what the average life of one of those brakes linings is? A. No.

Q. Do you know how to operate a winch, yourself? A. Yes.

Q. Did you ever drive a winch?

A. Well, that is a long time ago. I have never been driving electric winches, but I have been driving steam winches.

Q. Were these single or double winches?—That is, from the point of operation?

A. There are two separate winches, but they are placed in such a position that you work one with the left hand and one with the right hand.

Q. In other words, one man operated two winches?

A. One man operated two winches.

Q. Were these winches equipped with manual brakes?

A. That I don't remember. I don't think they were. I don't remember whether the electric winches were equipped with foot brakes or not. [231]

Q. Where were the winches situated on the No. 1 hatch, forward or aft?

A. In the after part of the hatch.

Q. Is it possible to adjust the brakes on these

(Deposition of Kristian Bauer.)

winches, that is, the winches on the No. 1 hatch of the Goucher Victory?

A. Oh, I imagine it is possible to adjust the brakes on any of the winches.

Q. What sort of mechanism is furnished for adjusting those brakes?

A. Just tighten up a bolt, a nut.

Q. Where is the bolt and nut placed on the winch?

A. I think they are just underneath. I am not sure. I don't remember. I think they are underneath.

Q. That would be underneath the winch drum?

A. Well, not altogether underneath; a little on one side, so they could get it out. Most likely on the outer part.

Q. There is a nut there that you tighten up to tighten the brakes? A. Yes.

Q. Do you know whether anyone ever tightened that nut while you were aboard the vessel?

A. No.

Q. Referring again to the No. 1 winch—— [232]

A. (Interposing): ——No, there was not.

Q. Was there any material aboard that vessel for lining the brakes on the winch drums?

A. That I do not know, but I imagine there was. The electricians would have charge of that, anything like that.

Q. Did you at any time ever operate the winch yourself, that is, the winch on No. 1 hatch?

(Deposition of Kristian Bauer.)

A. No; not on No. 1.

Q. What supplied the power for the winches on the No. 1 hatch of the Goucher Victory?

A. They had dynamos and generators down in the engine room to generate it.

Q. How was that power applied to the winch drum?

A. There is a motor there, and gear from the motor, engaging the gear on the winch drum.

Q. What type of motor was it?

A. As far as I remember, it was General Electric in those ships.

Q. Was the motor inside or outside of the winch drum, in relation to the ship's rail?

A. That I don't remember. I don't remember that.

Q. Were all the winches identical on this vessel?

A. Yes.

Q. On this No. 1 hatch you say there were two levers used to operate the winch, is that correct?

A. Yes. Have you ever noticed the operating of the lever on the straight gear?

Q. Yes. A. Well, it is the same thing.

Q. But they were so placed that one man could have a lever in each hand? A. Yes.

Q. As he stood operating the winches?

A. Yes.

Q. How did those levers operate, up and down, or crosswise?

A. When the levers are straight up, they stop,

(Deposition of Kristian Bauer.)

and the juice is off. You turn them one way for hoisting and the other way for lowering. I think you bring them back to lower, and forward to hoist.

Q. That is, you went forward to hoist, is that right?

A. I think so. I wouldn't swear to that, but as far as I remember, that is the way they work—you turn them forward to hoist, and backwards to lower.

Q. Were you familiar with the weight of the beams in the tween deck of the No. 1 hatch?

A. No. I couldn't say for sure.

Q. How long were the beams?

A. Somewhere close to 20 feet.

Q. I am referring now to the hatch beams. [234]

A. Yes. Somewhere close to 20 feet.

Mr. Poth: I think I have no further questions.

Mr. Franklin: That is all. Thank you."

Mr. Franklin: If the Court please, respondents offer in evidence the deposition of Kristian Bauer.

The Court: This deposition is received as part of respondents' case-in-chief. You may proceed.

JACOB PETRI

called as a witness by and on behalf of respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Will you state your name, please?

(Testimony of Jacob Petri.)

A. Jacob Petri.

Q. Would you spell your last name, please?

A. P-e-t-r-i.

Q. How old are you? A. 54.

Q. Where do you live?

A. 2822—36th West. [235]

Q. Are you single or married?

A. Married.

Q. Do you live with your family? A. Yes.

Q. What is your occupation?

A. I work as foreman for Rothschild Stevedoring Company.

Q. How long have you been engaged in stevedoring work?

A. By that, you mean all my experience on the waterfront?

Q. All your experience.

A. The first time I worked on the waterfront in 1914.

Q. How long did you work as a stevedore before you became a foreman?

A. Up to about 1939.

Q. Since 1939 have you been a foreman?

A. Yes.

Q. Employed exclusively by Rothschild Stevedoring? A. Yes.

Q. In the course of that experience, state what contact or experience you had in operating electric winches.

A. Well, while I was working as a longshore-

(Testimony of Jacob Petri.)

man, I was a deck man. By that, I mean I was operating winches or tending hatch all the time.

Q. Electric winches and steam winches?

A. Electric winches came into being—although I operated quite a few of them, they didn't come in very strong until about 1930, when they started coming out.

Q. Since 1930, have you had continuous experience with electric winches? A. Yes, sir.

Q. On May 13th, 1946, where were you employed?

A. I was employed for Rothschild Stevedoring on the Goucher Victory.

Q. Did you have a gang working under you?

A. Yes.

Q. Was Mr. Dillon one of that gang?

A. Yes, sir.

Q. Had you known Mr. Dillon previously?

A. Yes, I did.

Q. Many years? A. Yes.

Q. And did I ask you what time you went to work on May 13th with the gang?

A. We went to work at 6:00 p.m. that evening.

Q. That was Monday evening?

A. Monday evening.

Q. Had you worked previously in No. 1 hatches on that ship the previous day? [237]

A. No, not that day.

Q. What work did you do upon turning the gang to? What hatch did you proceed to unload?

(Testimony of Jacob Petri.)

A. When we turn the gang to, I believe we started working No. 2 hatch first.

Q. Later, did you start to work at No. 1 hatch?

A. Yes, sir.

Q. About what time, do you think?

A. I think it was about 8:30 when we went to No. 1 hatch.

Q. What is usual or customary about the stevedores when you are going to work on a hatch on a new ship as to what examination and testing is made of the winches?

A. Well, as a rule the winch driver runs the empty hook back and forth to see if the winches are in operating order.

Q. Who was the winch driver operating No. 1 hatch from 8:30 on until Mr. Dillon's injury?

A. Paul Rigney.

Q. Did you observe him testing No. 1 winches to make sure they were satisfactory in every way?

A. Well, I couldn't—I don't remember that particular instance.

Q. Did Mr. Rigney at any time prior to Mr. Dillon's accident make any complaint to you that No. 1 winches were [238] faulty or defective in any particular? A. No, he did not.

Q. How long after you began operating No. 1 winches until Mr. Dillon's injury occurred?

A. Approximately two hours after we started working that hatch.

(Testimony of Jacob Petri.)

Q. During that two hour period, were you steadily in the vicinity of No. 1 hatch?

A. Well, I was either at the hatch or on the dock, back and forth.

Q. Did you observe cargo being loaded from the dock into the No. 1 hatch? A. Sir?

Q. Did you observe from time to time the cargo was being loaded into No. 1 hatch? A. Yes.

Q. What did you observe, if anything, as to the operation of the winches at No. 1 hatch during the loading of the cargo?

A. I didn't observe anything unusual.

Q. Did you notice at any time that the winches were slipping? A. No, I didn't.

Q. Was any complaint made to you at any time either by Mr. Rigney or any other member of the crew that the No. 1 [239] electric winches were slipping or defective in any way?

A. Not as I remember.

Q. If a request had been made or your attention had been called to that fact, what would you have done?

A. I would have called the ship's electrician.

Q. Would you have reported it to the electrician or the first Mate?

A. Either one that I ran into first.

Q. What type of winches were they at No. 1?

A. Electric winches.

Q. Up to what capacity? What was their capacity? A. Their capacity is about five ton.

(Testimony of Jacob Petri.)

Q. What was the weight of the draft of the sling loads or net loads that were going into the hold? Would you estimate, prior to Mr. Dillon's injury?

A. I don't suppose we hoisted anything much over a ton.

Q. Did you see Mr. Dillon's injury?

The Court: Do you mean, did you see the happening?

Q. Did you see his accident?

A. Yes, I saw the accident.

Q. Where were you standing immediately prior to the accident?

A. I was standing at the hatch, looking down into the hatch.

Q. When you say you were standing at the hatch, what [240] hatch was that?

A. No. 1 hatch.

Q. Which side of the hatch were you looking into?

A. I was looking from the starboard side of the hatch.

Q. You were on the starboard side?

A. Yes.

Q. Where was Mr. Dillon standing at that time?

A. Mr. Dillon was on the lower tween decks, on the port side of the hatch.

Q. He was across the square from you?

A. The opposite side of the hatch.

The Court: Opposite side of the hatch from whom?

(Testimony of Jacob Petri.)

The Witness. From me.

The Court: Did you say you witnessed the accident?

The Witness: I saw it.

Q. How many men, roughly, were working at the hold at the time of Mr. Dillon's accident?

A. Eight.

Q. How many on the port side and how many on the starboard side?

A. Usually four on each side.

Q. What were the men doing immediately prior to Mr. Dillon's accident?

A. They were placing a strongback. [241]

Q. Would you describe the approximate weight of this strongback?

A. This particular strongback wasn't very heavy. I presume it weighed not over 800 pounds.

Q. Could you give us an idea as to the dimensions of it?

A. It was an I beam, 10 by—I believe about 10 by 14.

The Court: What do you mean by that, 10 inches?

The Witness: 10 inches in width and 14 feet in length.

Q. Was this a king beam? A. Yes, sir.

Q. Does a king beam have a raised flange?

A. It has a raised flange in the center to hold the hatch boards in place.

Q. Who was the winch driver?

(Testimony of Jacob Petri.)

A. Paul Rigney was the winch driver at that time.

Q. Was anybody else standing about the hatch?

A. This particular hatch, we had to use two hatch tenders.

Q. Why.

A. Because there is a companion way right in front of the winch driver.

Q. Was any stevedore giving signals to the winch [242] driver because it was a blind hatch?

A. Yes.

Q. Who?

A. A fellow by the name of Ford.

Q. Was there a fellow by the name of Sellman?

A. Yes, Sellman and Ford were the hatch tenders.

Q. How was this beam rigged? What rigging did it have on?

A. We raised it with hook spreaders.

Q. And it has been testified that the hook spreaders consist of two falls that run from the hook and fit into holes in the strongback?

A. Yes.

Q. Is that roughly correct?

A. That is roughly it.

Q. Was this beam originally raised from the poopdeck below?

A. Well, you couldn't say that was the poop-deck.

Q. Well, the forecastle head deck?

(Testimony of Jacob Petri.)

A. Well, we call it the orlop deck on those ships, and the beam was laying in the wing of the orlop deck.

Q. That is the deck upon which you were standing?

A. That is the deck they were going to cover up.

Q. After the spreader was secured to the strongback, what happened next? Who gave any orders and what was done? [243]

A. They picked the strongback up and held it over the hatch.

Q. Who is "they"? A. The longshoremen.

Q. Who gave the signal to Rigney to raise the beam? A. Sellman and Ford.

Q. Then what did Mr. Rigney, the winch driver, do with the beam?

A. They raised it up first so they could swing it over the hatch and they lined it up with the keeper.

Q. What is the keeper? Is that the slot?

A. That is the slot the beam fits into.

Q. With what speed was the strongback lowered in the vicinity of the slot?

A. I don't remember just how fast they were traveling. As near as I could see, it wasn't unusual.

Q. Then what happened with reference to the strongback as it was being lowered in the vicinity of the slot on the tween deck?

A. As they lowered it, one side went into the keeper and the other side didn't.

Q. When you say one side went into the keeper,

(Testimony of Jacob Petri.)

do you mean one side of the strongback went into the slot? A. That's right.

The Court: By "side" do you mean end, or do you [244] mean side?

The Witness: It went in——

The Court: Do you mean the end or the side of the strongback went into the slot?

The Witness: The end.

Q. Which end or which side of the tween decks did that occur on?

A. Do you mean by that, which side——

The Court: Which went in first?

The Witness: The starboard end went in first.

Q. That was the end across from where?

A. From Dillon.

Q. What angle did it go in?

A. It went on just a slight angle.

Q. What happened to the port end of the strongback? A. It rested on top of the keeper.

Q. And by the keeper, you mean the slot?

A. That's right.

Q. Is it common or uncommon when you are lowering a beam or strongback for the strongback, the end of the beam, to get fouled up in the slot?

A. It is very common.

Q. Could you give us any idea how high Dillon's end of the strongback was above the slot?

A. When we first landed it? [245]

Q. Yes.

A. He had hold of the top of the strongback at that time.

(Testimony of Jacob Petri.)

Q. The first thing was done, the strongback was lowered into position and fouled on the starboard end? A. It fouled on the port end.

Q. Fouled on the port end? A. Yes,

Q. What was the position of the end, the position of the beam with relation to the slot at that time on the port side?

A. On the port side, it just rested on top of the keeper.

Q. Now, what was done with reference to remedying or correcting that condition?

A. Well, first they tried to jump it in place with a hatch cover.

Q. Let me ask you, when that condition occurred, what was done by Rigney, the winch driver, as to shutting off the juice?

A. The winches were idle at that time.

Q. What was first done?

A. They tried to jump it into place with a hatch cover.

Q. Who tried to jump it in? [246]

A. The fellows that was working on that side.

Q. On what side?

A. On the port side, that was working with Dillon.

Q. Did you observe Mr. Dillon trying to jump this end into position? A. Yes.

Q. How long were they engaged in doing so?

A. Approximately a minute or a minute and a half.

Q. With what results? A. With no results.

(Testimony of Jacob Petri.)

Q. During this minute, was there any movement in the position of the beam? A. No.

Q. Or was the winch moving the beam in any way? A. No.

Q. What was the position of the hook they hooked in from the spreader into the port hole on the beam? A. That hook come unhooked.

Q. Why did it come unhooked?

A. When they landed the beam, being as that side didn't go into the keeper, it was higher so that hook come out of the hole.

Q. Did it come loose?

A. Yes, it come loose.

Q. Which way did it go with reference to forward or [247] aft of the beam?

A. One of the fellows was holding the hook with the line.

Q. Was there a tag line on those spreaders?

A. Yes.

Q. Would you tell the Court what a tag line it?

A. A tag line is to—when they hook on to the beam, they can guide the beam whichever way they want to swing.

The Court: Did you make a statement with reference to whether or not there was a tag line?

The Witness: Yes, sir.

Q. How many guide lines were there?

A. One on each hook.

Q. One on each side? A. Yes, sir.

Q. Did one of the stevedores have hold of this tag line? A. Yes.

(Testimony of Jacob Petri.)

Q. After the efforts of Mr. Dillon and his associates to free that port end of the beam failed, what was done next that you observed?

A. Dillon was going to put the hook back in through the hole of the strongback so they could hoist it again.

Q. Would you describe to the Court the position of Mr. Dillon's body as he reached over to get this port [248] spreader that had become unhooked?

A. He was down on his knees, and he supported himself with his right hand on the end of the strongback and as he reached out with the hook to put it in the hole, the weight of his body, I presume, caused the strongback to fall into the keeper.

Q. Did you observe the position of Mr. Dillon's right hand immediately before the injury?

A. No, I didn't.

Q. Could you see what part of the strongback he had hold of? A. Yes.

Q. What part was it?

A. He had the end of the strongback.

Q. When you say "the end of the strongback" where was that with reference to the top flange?

A. That would be—well, supposing this is a strongback, it would be like this (indicating).

Q. Right on the end? A. Right on the end.

Q. Did you see Mr. Dillon bear any weight on this fouled strongback from his body?

A. As he reached out, I presume he put weight on the strongback.

(Testimony of Jacob Petri.)

Mr. Zabel: I think that is a presumption, if the Court please.

The Court: The objection is sustained, and the statement of the witness about what he presumed is stricken and the Court will disregard it.

Q. From what you saw, what did you conclude Mr. Dillon had done with reference to placing the weight of his body against the beam?

Mr. Zabel: I think that calls for a conclusion of the witness.

Mr. Franklin: I think it is physical facts.

The Court: The objection is sustained. He will have to state what he saw.

Q. What did you see with reference to the position of Mr. Dillon's body against the——

A. While he was in the act of putting the hook into the hole in the strongback, the strongback fell into place and immediately I saw that he was pinned, so one of the boys put the hook into the strongback anyway and they were going to pick it up. I told them not to move that beam because I was afraid it would cut his fingers off, so I ran down and we lifted the strongback up with a piece of dunnage and freed his hand.

Q. Was there any way Mr. Dillon could have secured the port spreader into the hole in the beam without placing his right hand on the end of the beam? [250]

A. No, hardly. He would have to support himself some way.

(Testimony of Jacob Petri.)

Q. At any time after you first observed Mr. Dillon and his associates trying to free this fouled strongback on the port side, were the winches operating?

A. At the time they was trying to enter this——

Q. No, at any time from the time they were trying to free the fouled end of the strongback until Mr. Dillon's accident, were the winches in operation?

A. No.

Q. Did you finally succeed in freeing Mr. Dillon's hand?

A. Yes, we freed his hand in a very few minutes.

Q. Where was his hand caught?

A. It was caught in between the end of the strongback and the hatch coaming.

Q. Did you see that Mr. Dillon was given immediate medical attention?

A. Yes, I took him to the ship's doctor.

Q. Afterwards, after Mr. Dillon's accident, was the beam placed in position?

A. The beam was in position after that.

Q. After the accident? A. Yes.

Q. How much longer were the electric winches operated [251] at No. 1 hatch?

A. We finished covering up that hatch.

Q. How long did that take?

A. It took them about an hour, I suppose.

Q. Did you observe anything defective in the operation of the winches during that hour period?

A. Well, during that hour period, during the

(Testimony of Jacob Petri.)

time they were covering up, I wasn't around the hatch. I was with Dillon most of the time.

Q. Were any complaints made to you by Mr. Sellman or Mr. Rigney relative to the condition of the winches? A. No, not to me.

Q. After Mr. Dillon's accident? A. No.

Q. If those winches had been unsatisfactory at any time or unsafe or defective, what would you have done as foreman for Rothschild Stevedoring Company?

A. I would have reported it, went to the First Mate or the electrician on the ship.

Q. And if they could not have been repaired satisfactorily, what would you have done?

A. We wouldn't operate them.

Mr. Franklin: That is all. [252]

Cross-Examination

By Mr. Zabel:

Q. How far above the point where Mr. Dillon was standing were you? A. About 30 feet.

Q. You were about 30 feet above?

A. About that, I would say.

Q. And you were on the opposite side of the hatch? A. That's right.

Q. Do you recall whether or not any repairs were made in any of the hatches on the ship?

A. Not to my knowledge.

Q. Whether or not any repairs were made in the No. 2 hatch? A. Not that I know of.

(Testimony of Jacob Petri.)

Q. How was the beam raised from Mr. Dillon's hand?

A. With a piece of dunnage, or just a piece of lumber, a piece of 2 by 4.

Q. A piece of 2 by 4?

A. A piece of lumber.

Q. This beam weighed about 1000 pounds?

A. No. It weighed 800 pounds, it was a heavy beam.

Q. You took a piece of 2 by 4? A. Yes.

Q. Who applied the 2 by 4? [253]

A. I directed the boys. You see, you can get hold of the edge of the hatch coaming. We lifted it about two inches.

The Court: What persons had hold of the 2 by 4 and applied it to the beam to raise the beam?

The Witness: Two of the boys that was working on Dillon's side.

The Court: Do you know their names?

The Witness: No, I don't. I don't know which two of the men was working on that side with him.

Q. Did you have 2 by 4's available there?

A. There was lumber laying around there. There usually always is lumber on the hatch of a ship for dunnage.

Q. But you were not loading lumber that day?

A. No.

Q. No type of lumber? A. No.

Q. Do you recall the lowering of the beam, that the signal was given by the hatch tender?

A. Yes.

(Testimony of Jacob Petri.)

Q. And he did lower the beam down into this No. 1 hold?

A. From the main deck, do you mean?

Q. Yes. [254]

A. The beam was in the deck they were working.

Q. They had to raise it and lower it?

A. They just picked it up and swung it over the hatch and then lowered it into place.

Q. How high did they pick it up?

A. Possibly two feet.

Q. About two feet? A. About that.

Q. And then they moved it over the slot?

A. Over the hatch and over the slot.

Q. And from that point is where the beams were let down from that two-foot point?

A. Something like that.

Q. On which side was Mr. Sellman?

A. He was on the starboard side.

Q. How far were you from him?

A. I was standing right beside him.

Q. And you saw him give the signals?

A. Yes.

The Court: On what deck were you when you witnessed the accident?

The Witness: On the main deck.

The Court: How many decks above the deck on which Mr. Dillon was working?

The Witness: As this ship is arranged, I think that is about four decks down.

(Testimony of Jacob Petri.)

The Court: The one he was on was about four decks below the one on which you were?

The Witness: Yes, about 30 feet from where we were standing.

Q. Would you say that this beam was not raised by the winch after it got on his hand?

A. Yes, that's right. It wasn't raised with the winch after it fell on his hand.

Q. You came running down and then you told them to wait.

A. I told them to not move the winches, to wait until I got down there.

Q. And they didn't?

A. No, they didn't move the winches.

Q. Was Ford on the opposite side?

A. No, he was also on the starboard side, but he stood out to the rail. In order to operate this operation, you have to stand in a triangle position. One man stood at the hatch, the other man out to the rail, and the winch driver naturally was behind this house, and that is the reason for the two hatch tenders.

Q. These spreaders were supposed to have guide lines?

A. Yes.

Q. Are those guide lines part of the ship's gear?

A. Part of the ship's gear.

Q. Did you notice the spreaders as to where it was spliced?

A. No, I didn't.

Q. You didn't see any splicing on the spreader?

A. No I didn't notice the splice on the spreader.

(Testimony of Jacob Petri.)

Q. When they have these lines, don't they use those to guide those strongbacks into place if they are on those spreaders? A. That's right.

Q. And that is the safe and proper way to do it?

A. Yes.

Q. Were they using these lines? A. Yes.

Mr. Franklin: Who is "they"?

Q. Were the lines in use by the crew between decks at the time they were lowering this spreader?

A. Yes.

Q. They were?

A. They steadied the beam before they put it in place with the lines. Then after they steady it with the lines, a man usually takes hold of it. One or two men take hold of it to steady it down into the slot.

Q. It was steadied, and did the hatch tender give the signal to lower away? [257]

A. To lower it into place.

Q. And it came down? A. That's right.

Q. That is when Mr. Dillon was injured?

A. No, Mr. Dillon was not injured when the beam was landed the first time.

Q. Wasn't he trying to place the strongback in the slot? A. Yes, he was.

Q. And he was doing that at the time it was being lowered away?

A. Yes, he was in the whole operation. After it was landed——

Mr. Franklin: Just continue your answer.

Mr. Zabel: I didn't mean to interrupt you.

(Testimony of Jacob Petri.)

The Witness: After it was landed, one side of the beam didn't go into the slot and as I said before, they tried to jump it into place with a hatch cover. It wouldn't go down so they decided to hook on to it again, to pick the beam up again and during that, Dillon wasn't hurt until he reached out to re-hook the beam with this hook spreader. That is when the beam fell into place and caught his hand.

Q. You are sure that those lines were there? You are positive about that? [258]

A. Yes.

Q. Are there occasions when they are not there?

A. There are occasions they don't have them on, but if they don't, we always get some to put on.

Q. You were up there when his hand was caught and that is when you came running down?

A. Yes, I ran down to where they were.

Q. After his hand was caught?

A. That's right, after his hand was caught.

Q. You didn't run down after they fouled the strongback?

A. No, I was on deck until the time his hand was caught.

Q. You saw it was fouled there, but you still stayed there?

A. Yes. You could see his hand was fouled and the man was hurt, so I run down to help them get that hand out of there.

Q. In other words, you ran down after the strongback was—in other words, Mr. Dillon was

(Testimony of Jacob Petri.)

hurt while you were still up there on the top deck?

A. Yes.

Q. On the starboard side?

A. I was on the starboard side about four decks above Dillon. [259]

Mr. Zabel: I think that is all.

Redirect Examination

By Mr. Franklin:

Q. How many feet below was Mr. Dillon from where you were standing?

A. I would say about 30 feet.

Q. How was the lighting?

A. It was very good.

Mr. Franklin: That is all. Thank you.

The Court: You may step down.

(Witness excused.)

The Court: At this time, we will take a ten minute recess.

(Recess)

Mr. Franklin: If the Court please, may I have this document marked for identification purposes? This, Mr. Zabel, is a document known as "Warship-steve contract" between the United States of America War Shipping Administration and the Rothschild Stevedoring Company.

The Court: Will you wait until it can be marked so that the record will leave no doubt as to what you are referring to. [260]

(Addendum to Stevedoring Contract marked Respondent's Exhibit A-2 for identification.)

The Court: Let the record show that your statement was made with reference to what has been marked.

Mr. DuPuis: On behalf of the third party respondent, we have no objection to the authenticity of Respondent's Exhibit A-2, but on behalf of the third party respondent we do object to it on the ground that it is incompetent, irrelevant, and immaterial, on the ground that there is no evidence at this stage of the cause to support a charge of liability or negligence against the third party respondent bringing them within the purview of this contract.

Mr. Franklin: Subject to those objections, if the Court please, respondent offers Respondent's Exhibit A-2 in evidence.

Mr. Zabel: I personally have no objection.

The Court: It is now admitted. The objection is overruled.

(Respondent's Exhibit A-2 received in evidence.) [261]

RESPONDENT'S EXHIBIT A-2

Form

Addendum to

Warshipsteve 4/1/44

Pacific Northwest

and Soucal

Addendum to Contract No.

WSA 4-1487

DA-WSA 4-420

Addendum To Stevedoring Contract

This Addendum entered into as of the 1st day of July, 1944 by and between The Administrator, War Shipping Administration (hereinafter called the "Administrator"), representing the United States of America, and Rothschild International Stevedoring Company, a corporation organized and existing under the law of the State of Washington, a partnership consisting of.....an individual doing business as.....whose mailing address is 1706 Northern Life Tower..... (hereinafter referred to as the "Stevedore"),

Witnesseth:

Whereas, the parties hereto entered into a contract (numbered as above and hereinafter called the "contract") to which this is an addendum for the performance of stevedoring services; and

Whereas, the Contract provides, in Paragraph 5(c), Part I, that it may be amended, modified or supplemented in writing at any time by mutual consent of the parties thereto; and

Respondent's Exhibit A-2—(Continued)

Whereas, the parties desire to amend and modify the Contract in the respects hereinafter set forth, in order to clarify the same and effectuate the understanding of the parties at the time said Contract was made and entered into;

Now, Therefore, The Administrator and the Stevedore mutually agree as follows:

Item 1. The first paragraph of Paragraph 2.(c) of Part I of the Contract is hereby amended to read as follows:

“2.(c) As payment for supervision, use of gear, overhead and compensation for the loading or discharging of mail, baggage, specie and bullion, ship's and subsistence stores, livestock, animals, live poultry and birds, scrap and returned war materials and war equipment, for miscellaneous work in connection with trimming, leveling or shifting of ballast (when such work does not involve the discharge or loading of the same ballast), for loading and discharging ballast when tonnage is not known, or when it is impossible to segregate ballast handled on a tonnage basis from that handled on a man hour basis, for cleaning holds (whether or not cargo is loaded therein or discharged therefrom), for discharging or loading excess dunnage not used for the stowage of cargo handled by the Stevedore, for transferring cargo from hold to hold, and for any other service which is not provided for in this contract but which the Administrator may specifically request to have performed, as follows:”

Respondent's Exhibit A-2—(Continued)

Item 2. Paragraph 1.(a) of Part II of the Contract is hereby amended to read as follows:

1.(a) The term "direct labor" as used in this contract means all longshoremen, winchmen, operators of mechanical equipment, hatch foremen, walking bosses, gearmen, assistant foremen, foremen, and other workmen, directly employed in performing the work. "Direct labor" shall not include any general supervisor of the work (by whatever title designated), except in connection with work described in Paragraph 2.(c), Part I hereof, and such other work as the Administrator may designate, and provided no work on a tonnage basis is being performed on the same vessel by the Stevedore simultaneously therewith."

Item 3. Paragraph 3.(b) of Part II of the Contract is hereby amended to read as follows:

"3.(b) For work enumerated in sub-paragraph (a) (1) of this paragraph, other than handling lines on docking, undocking and shifting where the Stevedore does not load or discharge cargo, the Stevedore shall be remunerated only as provided in Paragraph 2.(a) of Part I hereof, and shall receive no payment for supervision, overhead, etc., as provided in Paragraph 2.(b) of Part 1 hereof, except when the entire work in the vessel is handled on a man hour basis, for which the Stevedore shall be reimbursed as provided in Paragraph 2.(c) of Part I, and for work enumerated in sub-paragraph (a) (2) of this paragraph, and for handling lines

Respondent's Exhibit A-2—(Continued)
on docking, undocking, and shifting where the Stevedore does not load or discharge cargo, the Stevedore shall be remunerated as provided in Paragraph 2.(c) of Part I hereof; provided, however, that to the extent that any work is necessitated by the negligence or wrongful acts or omissions of the Stevedore or its employees, the Stevedore shall receive no remuneration whatsoever therefore."

Item 4. Except as hereby amended, all the terms, covenants and conditions of the Contract as they now exist shall remain unchanged and in full force and effect.

Item 5. This Addendum and the amendments effected thereby shall be effective as of the date hereinabove first set forth.

In Witness Whereof, the parties have duly executed this agreement in quadruplicate as of the day and year first above written.

UNITED STATES OF
AMERICA,

By E. S. LAND,
Administrator, War
Shipping Administration.

By /s/ [Illegible]
For the Administrator.

ROTHSCHILD-INTERNA-
TIONAL STEVEDORING CO.

Respondent's Exhibit A-2—(Continued)

[Seal] By /s/ R. C. CLAPP,

President.

(For Corporation).

Attest:

/s/ H. G. TIEFEL,

Asst. Secretary.

Approved as to form:

/s/ WILLIAM J. BAU,

For the General Counsel War Shipping Administration.

Counterpart II

Form

Contract No. WSA 4-1487

Warshipsteve

DA-WSA 4-420

4/1/44

Pacific

Northwest

Stevedoring Contract

War Shipping Administration

Rothschild International Stevedoring Co.

Contractor

Contents

Paragraph

Paging

Part I

1. Relationship of the Parties	1
2. Remuneration	1
3. Special Provisions	3
4. Time and Manner of Payment	3

Respondent's Exhibit A-2—(Continued)

5.	Duration of Contract	4
6.	Contract Documents	4

Part II

1.	Definitions	1
2.	Duties of the Stevedore	1
3.	Additional Duties of the Stevedore	2
4.	General Labor and Other Provisions	2
5.	Duties of the Administrator	4
6.	Computation of Certain Elements of Compensation	4
7.	Credits to Administrator	5
8.	Liability of Stevedore	5
9.	Insurance Requirements and Indemnification	5
10.	Audit, Reports and Records	8
11.	Disputes	8
12.	Assignments	8
13.	Subcontracts	9
14.	Termination for Cause	9
15.	Custom of the Port	9
16.	Waivers	9
17.	Member or Delegate Clause	10

Respondent's Exhibit A-2—(Continued)

18.	Warranty Against Contingent Fees	10
19.	Extra Work	10
20.	Status of Employees	10
21.	Agents and Nominees of the Administrator	10
22.	Compliance with Applicable Laws and Reg- ulations	11
23.	Renegotiation	11
24.	Repricing	11

Part I:

This Negotiated Contract, entered into as of the 1st day of July, 1944, between the Administrator, War Shipping Administration (hereinafter referred to as the "Administrator") representing the United States of America, and Rothschild International Stevedoring Company, a corporation organized and existing under the laws of the State of Washington, a partnership consisting of
, an individual doing business as
, whose mailing address is 1706 Northern Life Tower, Seattle, Washington (hereinafter referred to as the "Stevedore").

Witnesseth

That in consideration of the reciprocal covenants and agreements of the parties hereinafter set forth, the parties hereto do mutually covenant and agree as follows:

Respondent's Exhibit A-2—(Continued)

1. Relationship of the Parties. The Administrator engages the Stevedore, as independent contractor, to do and perform all the work herein stated subject to the terms, covenants and conditions of this contract and to such rules, regulations, directions, and orders as may be issued by the Administrator from time to time, at such docks, piers, or wharves in the Port(s) of Puget Sound Ports and adjacent water ports and with respect to such cargo and vessels, as the Administrator may from time to time direct or designate. The Stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the Administrator in all respects, and to avoid any delay, loss, or damage whatsoever to the Administrator.

2. Remuneration. As full and complete remuneration for the work to be done and performed by the Stevedore, the Administrator agrees to pay the Stevedore (subject to the Special Provisions set forth in Paragraph 3 of this Part I) a sum of money equal to the total of the following amounts:

2. (a) As payment for disbursement made or obligations incurred in connection with the work, a sum equal to the total of the amounts paid by the Stevedore as wages, insurance and other author-

Respondent's Exhibit A-2—(Continued)

ized costs, as provided in Paragraph 6(a), (b), (d) and (e) of Part II hereof, and payable by the Stevedore as taxes as provided in Paragraph 6(c) of Part II hereof.

2. (b)(1) As payment for supervision, use of gear, overhead, and compensation on all cargo other than as described in sub-paragraphs (b) (2), (b) (3), (b) (4) and (b) (5) of this Paragraph 2, at the rate of twenty-two and one-half ($22\frac{1}{2}$) cents per ton.

Except as otherwise provided a ton, as used in this Contract means a ton of weight or measurement as customarily freighted in the trade in which the vessel being loaded or discharged is operated; provided, that, if freighted at a rate per 100 pounds, 2240 pounds shall be considered as one ton, and, if freighted at a rate per cubic foot, 40 cubic feet shall be considered as one ton; provided, further, that as to lumber or logs and piling, payment to the Stevedore shall be computed only on the basis of measurement tons, and 600 feet B.M. of lumber or logs shall be considered one measurement ton and 30 lineal feet of piling of any diameter shall be considered one measurement ton. For the purpose of computing payment to the Stevedore for loading and discharging cargo for the armed services, a ton means 2240 pounds or 40 cubic feet whichever produces the greater tonnage.

2.(b)(2) As payment for supervision, use of

Respondent's Exhibit A-2—(Continued)

gear, overhead and compensation on bulk cargo at the rate of twenty (20c) cents per ton. For the purpose of computing payment to the Stevedore under this sub-paragraph, tonnage on inbound cargo shall be as per outturn weight and tonnage on outbound cargo, where satisfactory shipped weights are furnished, shall be on the basis of such shipped weights; provided, however, that if such bulk cargo is not weighed on outturn the manifest tonnage shall be used for the purpose of computing payment.

Bulk cargo as used in this sub-paragraph is defined as cargo (regardless of quantity or amount) which is not hand-stowed in the vessel, except for trimming.

2.(b)(3) As payment for supervision, use of gear, overhead and compensation on all cargo (other than cargo described in sub-paragraph (b)(2) of this Paragraph 2) loaded or discharged at terminals, where, by the custom of the port, a terminal company or other agency delivers or receives cargo at ship's tackle, and lumber loaded at mills, at the rate of twenty-four (24c) cents per ton, and on raw sugar in bags discharged at refineries at the rate of twenty (20c) cents per ton.

2.(b)(4) As payment for supervision, use of gear, overhead and compensation on all dry cargo loaded on or discharged from the deck of tankers at the rate of eighteen (18c) cents per ton.

Respondent's Exhibit A-2—(Continued)

2.(b)(5) As payment for supervision, use of gear, overhead and compensation for discharging damaged or solidified cargo, as follows:

At the rate of fifteen (15c) cents per man hour for each man hour of direct labor (as that term is defined in Paragraph 1 of Part II hereof) employed in such discharging.

2.(c) As payment for supervision, use of gear, overhead and compensation for the loading or discharging of mail, baggage, ship's and subsistence stores, livestock, animals, live poultry and birds; scrap and returned war materials and war equipment of any description; empty drums, barrels, boxes, cylinders, kegs and reels; for cleaning holds (whether or not cargo is loaded therein or discharged therefrom), for discharging or loading dunnage from and to holds in which the Stevedore does not load or discharge cargo, for transferring cargo from hold to hold, and for any other service which is not provided for in this contract but which the Administrator may specifically request to have performed, as follows:

At the rate of fifteen (15c) cents per man hour for each man hour of direct labor (as that term is defined in Paragraph 1 of Part II hereof) be employed in the loading or discharging, as the case may be, of such items or in performing the services above stated.

Respondent's Exhibit A-2—(Continued)

It is understood and agreed that the property or things handled pursuant to the provisions of this sub-paragraph regardless of how described are not "cargo" within the meaning of that word as used in Paragraph 2(b) of this Part I, but the same shall be considered to be "cargo" and the services in connection with the same shall be considered to be "work", for every other purpose of this contract.

3. Special Provisions.

3.(a) The term "cargo" shall include ballast. Ballast may be bulk cargo or general cargo, as the case may be.

3.(b) It is understood that this contract does not apply to the handling of liquid cargo not packaged in containers, unless the Administrator specifically requests such handling pursuant to Paragraph 2(c) of this Part I.

3(c) It is understood that if any one lift such as an unboxed airplane, landing barge, torpedo boat, locomotive, or other article, stowed on the deck of a vessel (whether dry cargo or tanker), measures in excess of 150 tons, it shall, for the purpose of computing payment to the Stevedore hereunder, be considered as only 150 tons.

3.(d) When the Stevedore is a self-insurer under Paragraph 9 of Part II hereof, it shall be

Respondent's Exhibit A-2—(Continued)

reimbursed for its self insurance of liability as employer and under State workmen's compensation laws and longshoremen's and harbor workers' compensation laws as follows:

State workmen's compensation and Employer's Liability:

\$ None per \$100.00 of payroll

Longshoremen's and Harbor Workers' Compensation:

\$ None per \$100.00 of payroll

4. Time and Manner of Payment.

4(a). The Stevedore's remuneration shall be paid to it by the Administrator as soon as is practicable after the completion of each vessel operation worked under the provisions of this contract.

4.(b) Money due and owing to the Stevedore shall be paid to it only upon the submission of invoices properly executed and duly supported and certified. All such invoices for payment under this agreement shall refer to the date and number of this contract.

4.(c) In the event an invoice submitted for remuneration for the work, or any portion of such invoice is not properly supported or certified, the Administrator may nevertheless make partial payment thereof or payments on account of such portion of such invoice as has been properly supported

Respondent's Exhibit A-2—(Continued)

or certified. Such partial payment or payments on account shall not be deemed or held to be a waiver of the Administrator's right to revise or adjust such partial payment or payments on account in view or upon the basis of any data or information later received from or submitted by the Stevedore.

4.(d) The Administrator may make partial payments or payments on account of any portion or part of the work performed on a given vessel operation whenever the Stevedore would be entitled to final payment of remuneration for all of the work performed on such operation and under the same terms and conditions as such final payment would be made.

4.(e) If at any time the Stevedore is in default with respect to the furnishing of reports required by Paragraph 10 (c) of Part II hereof or otherwise, the Administrator may withhold payment of moneys otherwise due and owing to the Stevedore.

5. Duration of Contract.

5.(a) This contract is effective as of the day and year hereinabove first set forth with respect to operations commenced on or after said day and year, and, unless sooner terminated, shall extend until six months after the cessation of hostilities in the present war as proclaimed by the President. As of the effective date of this contract, any previous contract or agreement by the Stevedore with

Respondent's Exhibit A-2—(Continued)

the Administrator for stevedoring services shall terminate, without relieving the Stevedore of the responsibility for the loading or discharging of any cargo which the Stevedore is handling on such effective date under any such previous contract or agreement, and such termination shall neither affect nor relieve either party of any liability or obligation that may have accrued prior thereto.

5.(b) This contract may be terminated upon thirty (30) days' written notice by either party to the other party hereto; provided, however, that notwithstanding any such termination the Stevedore shall, at the option of the Administrator, continue to be responsible for the completion of any work which the Stevedore is performing on the effective date of such termination. Termination or expiration of this contract shall neither affect nor relieve either party of any liability or obligation that may have accrued prior thereto.

5.(c) This contract may be amended, modified or supplemented in writing at any time by mutual consent of the parties hereto. This contract may not be amended, modified or supplemented otherwise than in writing.

6. Contract Documents.

This contract consists of Part I and Part II (the latter being hereto attached and made a part hereof by reference) and such other instruments as may

Respondent's Exhibit A-2—(Continued)

be made by the parties in accordance with the provisions of this contract. All the provisions of said Part II and instruments are part of this contract as though hereinabove set out at length.

In Witness Whereof, the parties hereto have duly executed this contract in quadruplicate as of the day and year first above written.

UNITED STATES OF
AMERICA,

By E. S. LAND,
Administrator, War
Shipping Administration.

By /s/ [Illigible]
For the Administrator.

(For Corporation):

ROTHSCHILD INTERNA-
TIONAL STEVEDORING
COMPANY.

[Corporate Seal]

By /s/ R. C. CLAPP,
President.

Attest:

/s/ H. G. TIEFEL,
Asst. Secretary.

Approved as to form:

/s/ JAMES L. ADAMS,
For the General Counsel, War
Shipping Administration.

Respondent's Exhibit A-2—(Continued)

(This Certificate is to be completed only if the Stevedore is a corporation.)

I, H. G. Tiefel, certify that I am the duly chosen, qualified, and acting Assistant Secretary of Rothschild International Stevedoring Company, a party to this contract, and, as such, I am the custodian of its official records and the minute books of its governing body: that R. C. Clapp, who signed this contract on behalf of said corporation, was then the duly qualified President of said corporation; that said officer affixed his manual signature to said contract in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said contract is within the scope of the corporate and lawful powers of this corporation.

[Corporate Seal]

/s/ H. G. TIEFEL,
Asst. Secretary.

Part II:

1. Definitions.

1.(a) The term "direct labor" as used in this contract means all longshoremen, winchmen, operators of mechanical equipment, hatch foremen, walking bosses, gearmen, assistant foremen, foremen, and other workmen, directly employed in performing the work. "Direct labor" shall not include any general supervisor of the work (by whatever title designated).

Respondent's Exhibit A-2—(Continued)

1.(b) The term "wages" as used in this contract means (1) compensation paid for straight time, overtime, travel time, waiting and standby time, penalty pay, transportation, (including hire of busses, barges, tugs, or other vehicles or vessels for transportation), board and lodging, and any other compensation or benefits of direct labor, if direct labor is entitled thereto under the provisions of applicable collective bargaining agreements or under other wage scales, approved by the Administrator; (2) averaged wage rates approved by the Administrator for specified classifications of direct labor.

The term "wages" as used in this contract does not include contributions or payments made by the Stevedore for the maintenance of hiring halls as such contributions or payments are part of the Stevedore's general supervisory and administrative expenses and are not expenditures for wages.

1.(c) The term "work" as used in this contract means all work, duties, services, operations and functions in connection with stevedoring activities, and also other cargo handling and other similar activities, required hereunder to be done or performed by the Stevedore.

1.(d) The term "employee" as used in this contract means employee, servant and agent.

1.(e) The term "approval" as used in this contract includes ratification.

Respondent's Exhibit A-2—(Continued)

2. Duties of the Stevedore. The Stevedore shall:

2.(a) At all times while the vessel is being worked, provide not less than one general supervisor in direct charge of the work on each vessel; load and discharge cargo; do and perform all the duties and functions usually and customarily done and performed by a Stevedore; furnish all labor of every nature and description and all gear and mechanical or other equipment (except as provided in Paragraph 5 of this Part II) necessary for the most efficient loading or discharging of the vessel, and transport the same to and from the vessel or the pier or terminal where the work is to be performed; provided that in performing the duties required in this Paragraph 2 the Stevedore will be reimbursed for furnishing lift trucks and cranes in accordance with the terms of Paragraph 6(g), Part II hereof where such lift trucks and cranes are used in performing duties under this Paragraph 2 which are peculiar to wartime operations as determined by the Administrator; provided, further, that the Administrator shall have the right to furnish gear and mechanical or other equipment which shall be used by the Stevedore in performing the duties of the Stevedore under this Paragraph 2 in which event the Stevedore will not be entitled to receive the compensation provided in Paragraph 6 of Part II hereof.

Respondent's Exhibit A-2—(Continued)

2.(b) While currently loading or discharging a vessel, pile cargo above man high and break down cargo from above man high and remove and handle cargo to or from piles on the pier or in the pier sheds, and to or from cars, barges, lighters, scows, or booms alongside; stow cargo in or discharge cargo from any part of the vessel including deep tanks, 'tween decks, bunker space, fore and aft peaks, and any other part of the vessel and/or the vessel's deck, in the order directed by and in a manner satisfactory to the Administrator and/or the Master of the vessel or his agent; provided that where, by the custom of the port, a terminal company or other agency receives or delivers cargo at ship's tackle, the Stevedore shall not do any work for the account of the Administrator prior to the delivery of cargo at ship's tackle on loading and after delivery of cargo at ship's tackle on discharging.

3. Additional Duties of the Stevedore.

3.(a) The Stevedore shall, when requested by the Administrator:

3.(a)(1) handle lines on docking, undocking and shifting; rig and unrig all gear, rigging and equipment necessary for loading or discharging, including loading or discharging heavy lifts when handled by ship's gear; shift lighters within reach of ship's tackle; take off and put on all hatches, strongbacks, hatch beams, hatch boards and tar-

Respondent's Exhibit A-2—(Continued)

paulins; load, discharge, shift and lay all dunnage; shift cargo on the vessel within the same hold; and do blocking, lashing, building shifting boards, and such other work as is required in the proper loading and stowing of the vessel.

3.(a)(2) clean holds, discharge or load dunnage from and to holds in which the Stevedore does not load or discharge cargo, or transfer cargo from hold to hold in the vessel. Dunnage removed from the vessel shall remain the property of the Administrator.

3.(a)(3) use special mechanical equipment, as defined in and pursuant to the provisions of Paragraph 6(f) of this Part II.

3.(a)(4) perform the stevedoring, as to the stowage aboard vessels, under the supervisory inspection of the Board of Marine Underwriters or other marine surveyor designated by the Administrator. The services of said Board or surveyor will be supplied and paid for by the Administrator.

3.(b) For work enumerated in sub-paragraph (a)(1) of this Paragraph, other than handling lines on docking, undocking and shifting where the Stevedore does load or discharge cargo the Stevedore shall be remunerated only as provided in Paragraph 2(a) of Part I hereof, and shall receive no payment for supervision, overhead, etc., as provided in Paragraph 2(b) of Part I hereof; and for work enumerated in sub-paragraph (a)(2) of this Paragraph, and for handling lines on dock-

Respondent's Exhibit A-2—(Continued)

ing, undocking, and shifting where the Stevedore does not load or discharge cargo, the Stevedore shall be remunerated as provided in Paragraph 2(c) of Part I hereof; provided, however, that to the extent that any work is necessitated by the negligence or wrongful acts or omissions of the Stevedore or its employees, the Stevedore shall receive no remuneration whatsoever therefor.

4. General Labor and Other Provisions.

4.(a) Overtime in performing any work shall be incurred or performed by the Stevedore only upon the authorization of the Administrator; provided that the Stevedore, whenever so authorized, shall work overtime.

4.(b) The Stevedore recognizes the relation of trust and confidence established between it and the Administrator by this contract and agrees to furnish its best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable and to cooperate fully with the Administrator in furthering the latter's interests. The Stevedore further agrees to furnish efficient business administration and superintendence in performing the work.

4.(c) Simultaneously with the execution of this contract and at such other times as requested by the Administrator, the Stevedore shall submit to

Respondent's Exhibit A-2—(Continued)

the Administrator a schedule or schedules of wages and contractual working conditions applicable to direct labor for which the Administrator shall be obligated to pay the Stevedore under Paragraph 6(a) of this Part II. The Administrator may disapprove any such wages and contractual working conditions within 60 days from the date hereof or the date of compliance with any such request. If within such period of 60 days the Administrator disapproves such schedule or schedules, in whole or in part, the Administrator shall communicate such disapproval to the Stevedore in writing. The Administrator shall disallow and deny reimbursement for any additional cost incurred by the Stevedore through payments to direct labor of any items disapproved by the Administrator. If the Stevedore, pursuant to any previous contract or agreement with the Administrator for stevedoring services has submitted a schedule of wages and contractual working conditions presently applicable to such direct labor and such schedule has been approved by the Administrator, no additional schedule shall be required upon the execution hereof, and the schedule so approved shall be the basis upon which the obligation of the Administrator to reimburse the Stevedore under Paragraph 6(a) of this Part II shall be measured.

Any changes in said schedules of wages and contractual working conditions which shall increase the cost of the work performed hereunder shall

Respondent's Exhibit A-2—(Continued)

be submitted to the Administrator in schedule form. The Stevedore agrees that it will, upon request of the Administrator, refer all schedules submitted in accordance with provision of this Paragraph 4(c), including such changes, to the War Labor Board or such other department or agency of the United States of America as has specific jurisdiction of the matter involved and if required by the War Labor Board or such other departmental agency, shall obtain its approval thereof.

4.(d) The Stevedore shall neither engage nor employ any person or organization to perform any of the work, whether as employee, sub-contractor or otherwise, after the Administrator shall have notified the Stevedore to terminate, dispense with or to refuse to employ the services of such person or organization; this provision shall be effective despite any previous approval of any such engagement or employment by the Administrator.

4.(e) The Stevedore agrees that in the performance of the work it will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. In the event the Stevedore enters into a sub-contract, in accordance with the provisions of Paragraph 13 of Part II hereof, a similar provision prohibiting discrimination shall be inserted in such sub-contract.

4.(f) The Stevedore shall not employ any convict labor in performing the work.

Respondent's Exhibit A-2—(Continued)

4.(g) No laborer or mechanic doing any part of the work contemplated by the contract in the employ of the Stevedore or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this sub-paragraph. The wages of every laborer or mechanic employed by the Stevedore or any sub-contractor engaged in the performance of this contract shall be computed on a basic day rate of eight (8) hours per day and work in excess of eight (8) hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight (8) hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this sub-paragraph, a penalty of five (\$5) dollars shall be imposed upon the Stevedore for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight (8) hours upon said work without receiving compensation computed in accordance with this sub-paragraph, and all penalties thus imposed shall be withheld for the uses and benefit of the Government.

4.(h) Whenever any actual or potential labor dispute is delaying or threatens to delay the timely

Respondent's Exhibit A-2—(Continued)

and efficient performance of the work the Stevedore shall immediately give notice thereof to the Administrator. Such notice shall include all relevant information with respect to such dispute.

5. Duties of the Administrator. The Administrator shall furnish and maintain in good working order all necessary masts, booms and winches and the necessary steam or power therefor; blocks, ropes for falls, dunnage, and necessary lights on wharves, piers and vessels; derricks or cranes when required to handle lifts in excess of the vessel's lifting capacity if, in the opinion of the Administrator, heavy lifts cannot satisfactorily be handled by rigging the vessel therefor.

6. Computation of Certain Elements of Compensation. The amounts referred to in Paragraph 2(a) of Part I hereof are the following:

6.(a) The amount legally expended by the Stevedore in payment of wages, as defined in Paragraph 1(b) of this Part II.

6.(b) The amount expended by the Stevedore for premiums of insurance policies written pursuant to the provisions of Paragraph 9 of this Part II, or, the amount to which the Stevedore may become entitled as a self-insurer of certain of the above risks under the terms of this contract, including, if specific approval has been given for the use of the Retrospective Rating Plan, any addi-

Respondent's Exhibit A-2—(Continued)

tional premiums which may develop, and any assessment which may be made under a policy issued in a mutual company.

6.(c) An amount equal to all taxes payable by the Stevedore (only employer's contribution) pursuant to the Social Security Act and applicable unemployment insurance laws, in respect to the wages paid as per sub-paragraph (a) of this Paragraph.

6.(d) The amount expended by the Stevedore, when working in the stream, in transporting gear from pier or wharf to the place where such gear is to be used, and return.

6.(e) The amount of any other costs incurred and paid by the Stevedore at the written order or approval of the Administrator, if such written order or approval specifically authorizes a given additional cost as an extra item of cost.

6.(f) If rented, seventy-five (75%) per cent of the actual rental charge to the Stevedore, or, if owned, an allowance for use, of special mechanical equipment or gear specially designed for the loading or discharging of bulk cargo, and the full actual rental charge to the Stevedore, or, if owned, an allowance for use, of special mechanical equipment or gear to be used in lieu of ship's winches for the loading or discharging of cargo other than heavy lifts or bulk cargo, when any such special

Respondent's Exhibit A-2—(Continued)

mechanical equipment or gear is rented or owned by the Stevedore and its rental and/or use is requested or approved by the Administrator.

6.(g) Amounts to be determined by the Administrator as compensation for the use of lift trucks and cranes furnished by the Stevedore pursuant to Paragraph 2 of Part II hereof.

7. Credits to Administrator.

7.(a) The Stevedore shall make appropriate billings to the persons or organizations liable therefor, according to existing tariffs applicable to the work or according to such other tariffs as may be recognized by the Administrator, for all sums payable by such persons or organizations for loading or discharging lighters or cars which are handled direct from ship to lighter or car or vice versa. The Stevedore shall exercise due diligence in making such billings and in collecting charges so billed and shall maintain accurate records and books of account with respect thereto and furnish such reports covering the same as may be required by the Administrator; provided that when the Stevedore exercises due diligence in performing its duties under this paragraph, it shall not be liable to the Administrator for sums uncollected at the request of the Administrator or which otherwise prove to be uncollectible. The Administrator will, if practicable, assist the Stevedore in collecting such sums from the persons from whom or organizations from which the same are due. Any and all such accounts

Respondent's Exhibit A-2—(Continued)

receivable and any and all money so collected shall be and become the property of the Administrator. Moneys so collected shall be remitted by the Stevedore to the Administrator promptly after the end of the month in which collected, or, at the option of the Administrator, may be credited against moneys then or thereafter due and owing from the Administrator to the Stevedore. Accounts receivable shall, at the Administrator's option, be transferred and assigned (without recourse) by the Stevedore to the Administrator; provided, that in such event the Stevedore shall nevertheless remain obligated to exercise due diligence in assisting in the collection thereof.

7.(b) It is the intent of the parties that the Administrator reimburse the Stevedore only the actual cost of insurance required in the performance of the work. Since such actual cost in some instances cannot be determined until expiration of the policies and since the Stevedore will receive payment at the completion of each operation, the Stevedore agrees that with respect to policies of insurance for premiums on which it is to be reimbursed directly or indirectly by the Administrator the Stevedore will refund to the Administrator the proportionate share of return premiums due from policies written under Premium Discount, Retrospective Rating or other special rating plans, as well as dividends received from policies issued in mutual, participating or other dividend paying com-

Respondent's Exhibit A-2—(Continued)

panies, all as may be provided in Auditing and Accounting Instructions issued or to be issued by the Administrator. The Administrator's pro rata share of any and all moneys so obtained by the Stevedore shall be and become the property of the Administrator. Money so obtained shall be remitted by the Stevedore to the Administrator promptly after the end of the month in which obtained or at the option of the Administrator may be credited against moneys then or thereafter due and owing from the Administrator to the Stevedore.

8. Liability of Stevedore. While performing the work Stevedore shall, except as provided in Paragraph 9(e) hereof, be responsible for any and all loss, damage or injury (including death, wherever used in this contract) to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, cars, car-floats, or other property or thing, arising through the negligence or fault of the Stevedore, its employees, gear or equipment; provided, however, that the Stevedore's responsibility to the Administrator, War Shipping Administration, for any and all loss, damage or injury, as hereinabove in this paragraph enumerated, shall be limited in dollars to the amount of insurance provided for in Paragraph 9 of this Part II.

9. Insurance Requirements and Indemnification.

9.(a) The Stevedore shall procure, maintain

Respondent's Exhibit A-2—(Continued)

during the term of this contract, and pay for one or more policies of insurance insuring it as follows:

9.(a)(1) Standard Workmen's Compensation and Employer's Liability Insurance, and Longshoremen's and Harbor Workers' Compensation Insurance, or such of these as may be proper under applicable state or federal statutes. The Stevedore may, however, be a self-insurer against the risks in this sub-paragraph (1) mentioned, if it has obtained the prior approval of the Administrator thereto, such approval to be given upon the submission of satisfactory evidence that the Stevedore has duly qualified as such self-insurer under applicable provisions of law.

9.(a)(2) Public Liability Insurance subject to \$50,000/\$250,000 limits.

9.(a)(3) Property Damage Liability Insurance (which shall include any and all property, whether or not in the care, custody or control of the Stevedore) in an amount of \$250,000 on account of any one accident; provided that such policy or policies shall contain a so-called deductible clause as respects all risk of loss or damage specified in Paragraph 8 of this Part II, except the risk of loss, damage or injury to persons; provided, further, that as respects loss or damage to the vessel, its stores, apparel or equipment, the first \$500 of any such loss or damage shall be the risk of and for the account of the Administrator, and as respects any other loss or damage to which said so-called deduc-

Respondent's Exhibit A-2—(Continued)

tible clause applies, the first \$500 of any such loss or damage shall be the risk and for the account of the Stevedore.

9.(a)(4) Such other or additional insurance as the Administrator may from time to time specifically approve or require.

9.(b) The Administrator reserves the right to require the Stevedore to insure against any risk, hazard or casualty under the so-called Comprehensive Rating Plan, or other rating plan prescribed by the Administrator, if such risk, hazard or casualty is insured against pursuant to this contract or the premium of such policy of insurance is directly or indirectly paid for by the Administrator.

9.(c) All policies of insurance required under the terms of this contract to be carried by the Stevedore or for premiums on which it is to be reimbursed by the Administrator shall:

9.(c)(1) be written in such insurance companies as the Administrator may direct, and in the absence of such direction, shall be written in American insurance companies; provided, however, that where the Stevedore has heretofore carried such insurance or any part thereof in a foreign company admitted to do business in the State involved, and having assets in the United States, or has carried such insurance in Lloyd's of London, the continuation of such insurance is permitted in the absence of direction to the contrary;

Respondent's Exhibit A-2—(Continued)

9.(c)(2) by appropriate endorsement or otherwise waive all right of subrogation against the United States of America, provided that where the Stevedore is a self-insurer as provided in Paragraph 9(a)(1) hereof or obtains, by assignment or otherwise, any claim, demand or cause of action of any of its employees, the Stevedore agrees to and does hereby waive any and all such claims, demands, causes of action and rights of subrogation against the United States of America arising or resulting from the risk or liability so self-insured;

9.(c)(3) by appropriate endorsement or otherwise, provide that no cancellation thereof shall be effected unless thirty (30) days' prior written notice thereof has been given to the Administrator, addressed to the Director of War-time Insurance, War Shipping Administration, Washington 25, D. C.;

9.(c)(4) by appropriate endorsement or otherwise, provide that in the event of cancellation at the request of the insured upon cancellation or termination of this contract, such cancellation will be on a pro rata basis; and

9.(c)(5) by appropriate endorsement or otherwise, provide that three copies of any endorsement written subsequent to the issuance of the policy and affecting the coverage of such policy shall be transmitted by mail to the Director of Wartime Insurance, War Shipping Administration, Washington 25, D. C. at the time such endorsements are issued.

Respondent's Exhibit A-2—(Continued)

9.(d) A duplicate original or certified copy and two copies or two certificates, of each policy of insurance required under the terms of this contract to be carried by the Stevedore or for premiums on which it is to be reimbursed by the Administrator, shall be forwarded forthwith to the Director of Wartime Insurance, War Shipping Administration, Washington 25, D. C., and may be by him approved or disapproved as to adequacy of protection and propriety of the premium charge or rate. The certificate, if any, must show the rate of premium on the policy, and the waiver of subrogation and notice of cancellation provisions.

9.(e) The Stevedore's work is incident to war activities of the Government and will involve risks and hazards far in excess of those normally incident to peace time commercial operations. To induce the Stevedore to undertake the performance of the work for the compensation herein provided, and thus obtain for the Administrator the resulting benefit of such reduced compensation, the Administrator undertakes to and does indemnify the Stevedore and hold it harmless against any loss, expense (including expense of litigation) and liability to and claims of third persons because of loss, damage or injury to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, cars, carfloats, or other property or thing, arising through the negligence or fault of the Steve-

Respondent's Exhibit A-2—(Continued)

dore, its employees, gear or equipment, all subject, however, to the following conditions and limitations.

9.(e)(1) The undertaking of the Administrator shall be applicable only and limited to the amount such loss, expense or liability arising from any single catastrophe, accident or occurrence exceeds (a) for Bodily Injury Liability the sum of \$50,000 each person, and the sum of \$250,000 per accident, and (b) for Property Damage the sum of \$250,000 per accident, or (in either event) the sum of insurance approved or required to be carried in excess of these limits, whichever sum is greater.

9.(e)(2) The undertaking of the Administrator shall not be applicable and the Administrator shall have no obligation or liability in respect of such undertaking or otherwise, in situations in which such loss, expense, or liability is due in whole or in part to wilful and deliberate disregard of instructions of the Administrator or to the personal failure to exercise good faith or insofar as the character of the work permits under wartime operations, that degree of care normally exercised under like conditions in the performance of the Stevedore's peace time commercial operations by the elected corporate officers of the Stevedore or by the representative of the Stevedore having supervision and direction of all operations at any place where the Stevedore may perform services hereunder.

9.(e)(3) As soon as practicable after the occur-

Respondent's Exhibit A-2—(Continued)

rence of any event from which the obligation of the Administrator to hold the Stevedore harmless against loss, expense, and liability might arise, written notice of such event shall be given by the Stevedore to the Administrator, which notice shall contain full particulars of such event. If claim is made or suit is brought thereafter against the Stevedore as the result or because of such event the Stevedore shall immediately deliver to the Administrator every demand, notice, summons, or other process received by it or its representatives, and the Administrator shall provide appropriate attachment or appeal bonds or undertakings where required in the course of such litigation.

9.(e)(4) The Stevedore shall cooperate with the Administrator and, upon the Administrator's request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct (including defense) of suits; and the Administrator shall reimburse the Stevedore for reasonable actual out-of-pocket expense, other than loss of earnings, incurred in so doing. The Stevedore shall not voluntarily, except at its own cost, make any payment, assume any obligation or incur any expense, other than for such immediate medical and surgical relief to others as shall be imperative at the time of said occurrence of such event.

Respondent's Exhibit A-2—(Continued)

9.(e)(5) This undertaking of the Administrator to hold the Stevedore harmless against loss, expense, and liability, as herein in this Paragraph 9 provided, shall not create or give rise to any right, privilege, or power in any person or organization, except the Stevedore, nor shall any person or organization be or become entitled to join the Administrator as a co-defendant in any action against the Stevedore brought to determine the Stevedore's liability or for any other purpose; provided, however, that as to any risk borne or assumed by the Administrator through his undertaking above set forth, the Administrator shall be and hereby is subrogated by the Stevedore to any claim, demand or cause of action against third persons or organizations which exists or may arise in favor of the Stevedore, and the Stevedore shall, if so required, forthwith execute a formal assignment or transfer of such claims, demands or causes of action.

10. Audit, Reports and Records

10.(a) All items hereinabove set forth in Paragraph 2 of Part I hereof shall be subject to detailed audit by the Administrator. The Administrator may require adjustment or deny remuneration, payment or reimbursement for any expenditures by or work of the Stevedore for such items to the extent to which, in the Administrator's opinion, such expenditures have been made or work has been performed in contravention of any outstanding instructions or

Respondent's Exhibit A-2—(Continued)

orders or were unreasonable, improvident or excessive.

10.(b) The Stevedore shall keep complete and accurate records and books of account showing details of all income and expense incident to or derived from the performance of this contract, including, but not limited to, all revenue and the cost of all items set forth in Paragraph 2 of Part I hereof. The method of accounting employed by the Stevedore shall be subject to the approval of the Administrator but no material change will be made therein if the same conforms to good accounting practice and is sufficient for the purposes of this contract.

10.(c) The Administrator and his employees shall at all times have free and unrestricted access to the premises of the Stevedore and to the work and shall have the right to inspect, examine, audit, and make copies of the Stevedore's books, records, correspondence, vouchers, and memoranda of every description pertaining to the work. The Stevedore shall make such reports to the Administrator concerning the work, this contract, and the Stevedore's financial operations and standing, as the Administrator may determine or from time to time require. The Stevedore shall, without charge to the Administrator and without receiving additional remuneration or payment, keep and preserve all books, records, correspondence, vouchers, memoranda and reports of every description hereinabove in this

Respondent's Exhibit A-2—(Continued)

paragraph referred to for no less than six years from the date upon which final payment of a particular operation under this contract is made.

11. Disputes. Except as otherwise specifically provided in this contract all questions and disputes arising under this contract concerning questions of fact and which are not disposed of by mutual agreement shall be decided by the Administrator who shall reduce his decision to writing and mail a copy thereof to the Stevedore by registered mail. Within thirty (30) days from said mailing, the Stevedore may appeal to the Administrator, War Shipping Administration. The decision of the Administrator, War Shipping Administration, shall be final and conclusive upon the parties hereto. Pending decision of a question or dispute the Stevedore shall diligently proceed with performance of the work.

12. Assignments. The Stevedore shall not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, or by operation of law, this contract or any interest therein or moneys due or to become due thereunder, except pursuant to the Assignment of Claims Act of 1940 and with the approval of the Administrator; provided, however, that payment by the Administrator to any assignee of moneys due or to become due hereunder shall be deemed to be approval by the Administrator of such assignment, but only to the extent that such payments are made by him.

Respondent's Exhibit A-2—(Continued)

13. Subcontracts. The Stevedore shall notify the Administrator in writing whenever any portion of the work is to be performed by any other person or organization, whether as agent, subcontractor or otherwise. Without the approval of the Administrator, the Stevedore shall not make any arrangement or agreement whereby the work or any portion thereof is to be performed by any such person or organization and, in the event of such approval, the Stevedore shall be responsible to the Administrator for any action taken or work done by such person or organization. Any employee and any such person or organization selected or appointed by the Stevedore in connection with its performance of the work shall, despite any approval by the Administrator, be solely the agent of the Stevedore and not, in any respect, the agent of the Administrator.

14. Termination for Cause.

14.(a) In the event the Stevedore refuses or fails to do and perform the work in a manner satisfactory to the Administrator and with due diligence, or fails to comply with any of its obligations hereunder or is performing the work in bad faith, the Administrator may, by written notice, and without prejudice to any other right or remedy of the Administrator, terminate the right of the Stevedore to proceed with performance of the work or may terminate this contract or may undertake to complete the work (through his employees or by con-

Respondent's Exhibit A-2—(Continued)

tract), or may exercise any or all of such privileges. In the event of such termination, the Administrator will pay to the Stevedore, in accordance with the terms of Paragraph 2 of Part I hereof, the remuneration theretofore accrued under the terms of Paragraph 2 of Part I hereof, less any amounts which the Stevedore owes or for which it may be liable to the Administrator on account of breach of this contract, or otherwise. In the event the Administrator undertakes to complete the work, he shall be entitled to use such of the premises, gear and mechanical or other equipment of the Stevedore as may be necessary to the completion of the work, and the Stevedore shall be entitled to receive as remuneration therefor the reasonable rental value thereof as determined by the Administrator.

14.(b) The Stevedore shall be under no liability to the Administrator of any kind or nature whatsoever in the event that the Stevedore should fail to perform any work hereunder by reason of any labor shortage, dispute, or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the Stevedore whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities; provided, that this paragraph shall not be construed to relieve the Stevedore of its obligations promptly to comply with Paragraph 22 of this Part II. Provided, further, that if the work

Respondent's Exhibit A-2—(Continued)

performed hereunder shall be under circumstances where either the Navy or War Department has elected to exercise all supervision thereof, the Government shall be entitled forthwith to undertake completion of the work and the exercise of all privileges in connection therewith, whether the stoppage of such work should result from a cause or condition for which the Stevedore is not responsible or otherwise.

15. Custom of the Port. No rule or custom of the port in conflict with any provision or term of this contract will be binding upon the Administrator, unless the Stevedore is legally obligated to comply with the same pursuant to the laws of the United States or the laws of a state thereof.

16. Waivers. Any action by the Administrator in waiving any provision or provisions of this contract at any particular time or times shall not be deemed a waiver of such provision or provisions at any future time nor to require any other or similar indulgence on any other occasion.

17. Member or Delegate Clause. No member of or delegate to Congress or Resident Commissioner is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, except to the extent allowed by Title 18 U.S. Code Section 206.

Respondent's Exhibit A-2—(Continued)

18. **Warranty Against Contingent Fees.** The Stevedore warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Administrator the right to annul the contract, or, in his discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage or contingent fees. This warranty shall not apply to commissions payable by the Stevedore upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Stevedore for the purpose of securing business.

19. **Extra Work.** The Administrator will neither remunerate nor make any payments to the Stevedore for any extra work performed in connection with the work, except as provided in Paragraph 6(e) of Part II hereof.

20. **Status of Employees.** All employees of the Stevedore or of any other person or organization employed in performance of the work shall at all times be the employees of the Stevedore or of such other person or organization, as the case may be, and are not employees of the Administrator.

21. **Agents and Nominees of the Administrator.**

21.(a) Wherever and whenever herein any right, power or authority is given or granted to the Ad-

Respondent's Exhibit A-2—(Continued)

ministrator, such right, power or authority may be exercised by the Administrator, War Shipping Administration, or by such agent(s) as he may appoint or by his nominee(s) or by any Deputy Administrator or Associate Deputy Administrator or by the Assistant Deputy Administrator for Ship Operations, the Assistant Deputy Administrator for Fiscal Affairs, or the Pacific Coast Director, and the act or acts of any such agent(s) or nominee(s) Deputy Administrator, Associate Deputy Administrator, Assistant Deputy Administrator, or Pacific Coast Director, when taken, shall constitute the act of the Administrator hereunder.

21.(b) In performing its work the Stevedore may rely upon instructions and directions of any Deputy Administrator, Associate Deputy Administrator, the Assistant Deputy Administrator for Ship Operations, the Assistant Deputy Administrator for Fiscal Affairs, or the Pacific Coast Director, or upon the instructions and directions of any person or agency specifically authorized in writing by the Administrator, War Shipping Administration. Whenever practicable, the Stevedore shall request and obtain written confirmation of any oral instructions or directions so given.

21.(c) Wherever and whenever herein any right, power, or authority is given or granted in terms to the "Administrator, War Shipping Administration" such right, power or authority may be exercised

Respondent's Exhibit A-2—(Continued)

only by the Administrator, War Shipping Administration, his successor(s), or representative(s) thereunto duly authorized in writing.

21.(d) It is understood that services covered by this contract may be obtained hereunder by the Navy or War Departments and in such event if the department concerned shall so elect, all rights, powers, or authority given or granted to the Administrator hereunder may be exercised by an officer of such department authorized under the rules or regulations of the Administrator to so act, or by his representative, to the extent elected, and such officer or his representative shall have exclusive supervision thereof and the act or acts of any such officer or his representative when taken shall have the same full force and effect hereunder as the act or acts of the Administrator would otherwise have had. In performing its work under such circumstances the Stevedore may rely upon and shall comply with the instructions and directions of such officer or his representative, including, without limitation, directions to perform extra or unusual services, and to incur overtime services or additional costs under sub-paragraph 6(e) of this Part II.

22. Compliance with Applicable Laws and Regulations. In performing the work the Stevedore shall abide by and comply with all applicable statutes, ordinances, laws or regulations of the United States

Respondent's Exhibit A-2—(Continued)
(including Executive Orders of the President), any state, or any other public authority, now or hereafter in force.

23. Renegotiation.

23.(a) This contract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act, as amended by Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress) enacted February 25, 1944.

23.(b) In compliance with subsection (b) of the Renegotiation Act, the Stevedore shall insert in the subcontracts specified in said subsection (b) either the provisions of this Paragraph or the provisions required by said subsection (b).

24. Repricing. This contract and any subcontract hereunder are subject to Title VIII of the Revenue Act of 1943 (Public Law 235, 78th Congress) enacted February 25, 1944 (Repricing of War Contracts).

Admitted June 24, 1949.

Mr. Franklin: If the Court please, I had hoped by this time to have the usual photostatic copy of the General Agency Agreement which is pleaded in the complaint in the cause of Dillon vs. United States, the General Agency Agreement entered into by War Shipping Administration and the Union

Sulphur Company, which is germane to Cause No. 2261, the action which was consolidated with this admiralty action. I should have had it several days ago, but for some reason or other I have not received it. I would like the Court's and counsel's indulgence to supplement the record within the next few days with that document which will be available. It is a standard General Agency Agreement which Your Honor is familiar with. It is just a question of getting a photostatic copy showing executions by Union Sulphur Company.

Mr. Zabel: I have no objection to that proposal.

The Court: The respondent may proceed.

Mr. Franklin: Respondent United States of America rests.

The Court: With leave to supplement the record with that exhibit later?

Mr. Franklin: It may or it may not, if the Court please. In other words, I think the rule is pretty well settled. The general agent is not [262] liable under this type of suit, but the United States of America is. I take it in the event of judgment against the United States of America Mr. Zabel would be willing to dismiss the action, is that right?

Mr. Zabel: That is right.

The Court: There is nothing in the record to show the non-liability of the agent, to affirmatively show that. I do not know what the parties and their counsel will argue that may be shown touching the liability of the agent. I am not advised of that. There is no stipulation concerning it except the last

statement made, and I do not know that that condition will apply on anything that is in the record, any proof here now. I do not know what that situation will be.

Mr. Franklin: May I ask counsel if he will stipulate that the standard form of the General Agency Agreement which is found, if the Court please,—

The Court: Do you refer to it in any other case in this Court?

Mr. Franklin: I beg your pardon?

The Court: Can you incorporate some record of an exhibit in some other case in this Court or refer to it by reference, stipulate it may be referred to?

Mr. Franklin: It is the same type we used for the Tillman case. The only difference is that in the Tillman case the name Coastwise Line will appear and in the one involved here, the caption Union Sulphur will appear.

The Court: You still have not made a proposition for the Court to act upon. Do you want to ask Mr. Zabel to agree with you about something?

Mr. Franklin: I ask counsel if he will stipulate that I may supplement the record later by filing a photostatic copy of the standard General Agency Agreement executed between the United States of America War Shipping Administration and the Union Sulphur Company?

The Court: Is that the only thing you want? Do you want him to accommodate you by agreeing that some exhibit in some other case is the same thing

and that for convenience of counsel that exhibit may be referred to?

Mr. Franklin: I would ask counsel's further indulgence, if the Court please, if we could get the file in the case of Tillman vs. Coastwise Line which we tried before Your Honor. We used that form of General Agency Agreement. I think we could stipulate that it is identical to the form of agreement which [264] the Union Sulphur Company filed.

Mr. Zabel: I am willing to stipulate to that effect for the purpose of expedition.

The Court: Let the record show that.

Mr. Franklin: The respondent rests. I will introduce the General Agency Agreement in the Tillman case in this case when it is received.

Mr. Zabel: Yes.

The Court: I call the attention of counsel for respondent to the fact that both sides in the Tillman case are not represented, and the Court, without some representation as to the attitude about making that kind of use of the exhibit which is in another case before the Court, would not feel free to do it. I suggest to counsel on both sides in this case that if they are willing to do it, the Court could, pending the introduction in this case, of the exhibit which you have reserved the right to introduce, that for the convenience of all connected with this case in the further proceedings herein, until you do accomplish the filing in this case of that future exhibit which you are going to file, that reference be made to the exhibit in the other case. The Court has no

authority in the absence of Mr. Levinson to take that exhibit out of that file in that case and introduce it in this [265] one.

Mr. Franklin: That will be satisfactory, if the Court please.

The Court: Does the libelant wish to introduce any rebuttal?

Mr. Zabel: I would like to recall the plaintiff for rebuttal testimony.

The Court: He has already been sworn. The plaintiff may resume the stand.

ALFRED L. DILLON

recalled as a witness by and on behalf of libelant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zabel:

Q. You have heard the testimony of Mr. Petri with reference to the manner in which this accident happened on May 13th, 1946? A. Yes, sir.

Q. Do you recall he stated that one part of the beam was placed in the slot? A. Correct.

Q. One end of it, and the other one missed the slot? A. Yes, sir.

Q. And that your hand thereafter was caught?

A. That's right.

Q. You have already testified as to how this

(Testimony of Alfred L. Dillon.)

accident happened. I will ask you if, as he stated it, it is possible that it could have happened that way?

A. Well, I would like to have permission to step down to that open piece of the table and there I can explain it. It is just like a slot.

The Court: I think you had better answer counsel's question and let him make the suggestion about what to do.

The Witness: On the starboard side?

The Court: Your counsel had in mind the need to propound to you a certain question and to get from you a truthful answer thereto.

Q. Would you like to use this beam for illustration? A. Yes.

The Court: You may do that. Read the question.

(Last question read by reporter.)

The Court: The answer is yes or no.

The Witness: No, it could not.

Q. With the model beam you have there, will you describe [267] the physical manner in which that beam would conduct itself if one end of it was in the slot and the other one missed the slot?

A. Yes, sir, I can tell you that. Here is a slot here on the starboard side. The beam comes down and goes into that slot. If it misses the port side, you understand, that goes down onto the skin, as we call it, that is on the bottom of the hatch, and this end lays down until somebody goes down and hooks it up to replace it. If that had went down,

(Testimony of Alfred L. Dillon.)

I would have been in the clear. I wouldn't have been jammed with it.

In other words, the thing is, when the beam was—they took a 2 by 4, and that is against the safety code to use a 2 by 4 or anything else to lift that beam—if that had been lifted up by the winches to get my hand off and the hand wasn't caught, and it wasn't caught in the side. You do not reach out to take spreader hooks from the hole of the beam because the hole of the beam is right there in the clearance of the slot. That is where your hole is, it isn't out here. My body was never on that beam. He ran upstairs, he came down and he says, "Hold on, boys." He went up and came down and went up and came down and says, "All right, boys, lift it up." He says they lifted it up. They did not, it was lifted up by the electric winches.

Mr. Zabel: You may examine. [268]

Mr. Franklin: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Zabel: I would like to recall Mr. Sellman.

The Court: You have already been sworn. Take the stand.

CLAUD SELLMAN

recalled as a witness by and on behalf of libelant, having been previously duly sworn, was examined and testified as follows:

(Testimony of Claud Sellman.)

Direct Examination

By Mr. Zabel:

Q. In letting down this strongback, as I understand it, you let the strongback down, the purpose of it is to get it in both these slots athwartship, one on the starboard side and one on the port side?

A. That's right.

Q. If the strongback was let down and it hits the slot on the starboard side and misses the slot on the port side, what would happen to that strongback?

A. Well, the side that missed the slot would go on behind, since the slot sticks out from the coaming. It [269] would go on by and drop into the cargo, on into the hold.

Q. What would happen to the starboard end?

A. If it hit in the slot, it would stay in the slot. Of course, it would depend on how much slack you had on the winch whether it went down or held just below the coaming.

Q. If you had a lot of slack, it would come out of the slot?

A. The other end of the beam could go on down if you had enough slack and no cargo on hand, it would drop into the hold below.

The Court: Will someone ask the witness to describe the size of the slot, how deep it is from the hatch opening side or end of the slot back to the back of it, or the obstruction in the back of it which keeps you from pushing something farther

(Testimony of Claud Sellman.)

inward from the hatch opening in the slot? In other words, I want to know what the size or dimension of the slot may be?

Q. Can you describe that slot?

A. Well, this particular slot—of course, there are different sizes. It depends on the size of the beam. But if I remember correctly, this is a small beam and the slot is very narrow, $\frac{3}{8}$ or $\frac{1}{2}$ an inch slot that the beam goes directly in. Then it is a little wider at the top, flares out at the top to catch this I beam. The beam is in this [270] shape, flat on top and the flanges run down probably six inches below. The flange goes in the slot and the top rests on the top of this pocket. The pocket there is welded in or built in to the side of the hatch coaming.

The Court: Is pocket another name for the slot?

The Witness: Yes, sir.

The Court: How deep is that pocket or slot?

The Witness: It is the depth of the beam.

The Court: That is measured from the top of the beam to the bottom of the beam as it rests in the slot, is it?

The Witness: Yes, Your Honor.

The Court: I am talking about the other dimension, the dimension of the depth of the slot, measured laterally along the same plane as the deck.

The Witness: That protrudes out into the hatch from the coaming?

The Court: Yes.

(Testimony of Claud Sellman.)

The Witness: Of course, that would vary, too. I would say this one here was—it will average about two inches, I believe.

The Court: So at the bottom of the slot, where the strongback end was resting in the slot, at the bottom how deep is that slot, measuring it from the hatch opening and back to the back of it towards the [271] ship side on this tween decks deck?

The Witness: I don't know as I quite understand.

The Court: Forget about the depth of the ship. We are talking about this slot which is at the tween deck hatch opening of No. 1 hatch.

The Witness: Yes, sir.

The Court: The tween deck hatch opening, or level. Go to that hatch opening on either side, starboard or port of the ship, and look at this slot and measure it from the hatch opening towards either side of the ship.

The Witness: I think I see what you mean.

The Court: At the bottom of the slot as the bottom of the beam rests in the bottom of the slot, how deep is it? In other words, how much support, how wide is the support at the bottom of the strongback which that slot gives to the strongback. How many inches wide is that support?

The Witness: The bottom of the strongback?

The Court: At the bottom of the slot and the bottom of the strongback.

(Testimony of Claud Sellman.)

The Witness: The bottom of the slot is, as a rule, just the same as the beam. If this was a half-inch channel——

The Court: That is one thing, but how many inches or feet does that end of the beam have to rest on? [272]

The Witness: Well, it rests on——

The Court: Taken lengthwise of the beam, which is crosswise of the ship, is it not, the beam is placed crosswise of the ship?

The Witness: Yes, sir.

The Court: Taken endwise with that beam, how many inches support has the end of that beam on the port isde of the hatch in the tween deck?

The Witness: The beam has a—I don't know whether it is in a four or five inch channel. I think it is about a four inch channel the beam has a rest.

The Court: Then would the starboard end which went in the slot be pulled out by leaving the port end of the strongback up on the edge of the slot instead of being placed in the bottom of the slot?

The Witness: If one end is in the slot, the only way it can get out is that the beam falls clear down or the other end goes behind the slot and unhooks it. It would be the end that is in the slot that would unhook.

The Court: It would be easier for the starboard end of the strongback to be pulled out by the failure of the port end to be seated in the slot if on the starboard side the slot support was only about two

(Testimony of Claud Sellman.)

inches wide or two inches long under the end of that [273] strongback?

The Witness: Yes, sir.

The Court: The same would be true of the port side, but if the support was six or eight or ten inches wide, it would be a little more trouble to pull one end of the strongback away from its slot when it was seated properly in the slot by a failure to engage and seat the other end of the strongback in its proper slot?

The Witness: I was just trying to think how these stevedores like Brooks—they could tell you easier about that because I don't go down in that hatch very seldom. The exact length of that slot is——

The Court: You may proceed. The witness apparently has no qualifications to answer the question. He says longshoremen would know more about that than he would. He was the hatch tender.

The Witness: It is about 40 or 50 feet, and the exact length of this thing—they could tell you more about that than I could.

Mr. Zabel: That is all.

Mr. Franklin: No questions.

The Court: Step down.

(Witness excused.)

Mr. Zabel: I would like to recall Mr. Dillon.

The Court: You may do that.

ALFRED L. DILLON

recalled as a witness by and on behalf of libelant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Zabel:

The Witness: Well, Your Honor——

The Court: Wait just a moment. Proceed by question and answer.

Q. With reference to the slot on this particular ship——

The Court: At this deck.

Q. ——at this particular time on this particular day of May 13th, 1946, what was the depth of that slot from the beginning of the hatch to the side of that ship? A. You want the depth?

Q. Yes, that is laterally.

A. Yes, I understand.

Q. In other words, how much was hanging in the slot?

A. How much? The beam went right down what you call the flanges from the slot to take the flanges of the beam. [275] That holds it, and you can't go no further. There is also a little gear on the bottom she rests on. It is six inches depth, that is deep, the slot.

Q. Six inches down this way (indicating)?

A. Yes.

Q. Now, back from the hatch.

(Testimony of Alfred L. Dillon.)

A. You mean from the coaming to the outside?

Q. That's right.

A. Approximately one and a half inches width from the coaming of a ship.

Q. From the coaming toward the side of the ship?

A. Yes, sir. No, no, from the coaming—here is the coaming, you understand, and the slot comes only one and a half inches like that.

The Court: I believe that is responsive to the question the Court had in mind.

Mr. Zabel: I think that is all.

Mr. Franklin: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Zabel: Plaintiff rests.

The Court: Is there any further testimony on the part of respondent?

Mr. Franklin: No testimony on behalf of respondent.

The Court: Do both sides rest in both cases [276] consolidated for trial?

Mr. Franklin: Yes, Your Honor.

Mr. Zabel: Yes, Your Honor.

The Court: This matter is continued until Saturday, July 9th, 1949, at 9:30 o'clock in the forenoon for the purpose of further proceedings including the arguments of counsel on the merits and the Court's decision, if the Court is ready to make it,

on that occasion. If you care to do so, I would be glad to have you file a list of the authorities you may wish to comment upon.

Mr. Franklin: Might I raise this question? If Your Honor please, there is introduced in evidence the original copy of the Warshipsteve contract. With counsel's permission, could I take that and have that photostated and replace it with a photo-static copy?

The Court: You will have to arrange with the clerk for that. I think the clerk will have to send somebody along with that exhibit and be present at the photographing and bring it back.

Counsel are excused until the date I have mentioned.

(At 4:15 o'clock p.m., Friday, June 24, 1949, proceedings adjourned until 9:30 o'clock a.m., Saturday, July 9, 1949.) [277]

July 9, 1949, 9:30 o'Clock, A.M.

The Court: You may proceed.

Mr. Franklin: If the Court please, at the termination of the case, as Your Honor remembers, the matter was held open so that the Union Sulphur Company could file as an exhibit the usual General Agency Agreement. It arrived, I might say, the same evening the case terminated. I have shown it to counsel for libelant and counsel for third-party respondent, the standard General Agency Agreement.

In that connection, might I call the Court's attention to the fact that the Supreme Court has overruled the Huss case. The Huss case, if Your Honor remembers, held that the general agent was sueable. Now, in a series of cases, an opinion handed down on June 29th, they reversed that in line with Your Honor's holding and held that the general agent was not sueable by seamen but the action must be against the United States under the Suits in Admiralty Act.

The Court: Do you wish that copy marked as an exhibit?

Mr. Franklin: Yes, on behalf of Union Sulphur Company.

(General Agency Agreement marked Respondent's Exhibit A-3 for Identification.)

The Court: I understand it is now offered?

Mr. Franklin: Yes, if the Court please.

Mr. Zabel: No objection.

The Court: It is admitted in pursuance of the original arrangement. Do you wish the Court to understand with the admission of that exhibit that the respondent's case is now again closed?

(Respondent's Exhibit A-3 received in evidence.)

Mr. Franklin: Defendant Union Sulphur Company's case is closed, if the Court please.

The Court: Is there anything further on the part of the libellant so far as proof and evidence are concerned?

Mr. Zabel: No, Your Honor.

(Arguments made by counsel on behalf of libelant, respondent, and third-party respondent.)

The Court: The General Agency Agreement in evidence as Respondent's Exhibit A-3 convinces the Court that the Union Sulphur Company, Inc., a corporation, is not liable in this action and should be dismissed.

The Court has patiently heard and considered the testimony adduced on behalf of the libelant and respondent and the petitioner and third-party respondent, without undertaking to mention the identity of all the witnesses or [280] the details of all their testimony. Suffice it to say the Court has so heard and considered the testimony of the libelant, the physicians who have examined him, the winch driver, the hatch tender, the chief electrician, Steele, Frank Palmer, Jacob Petri, Kristian Bauer, Martin Packard and Dan Brooks, and each and all of the witnesses whose testimony has been received.

The Court is convinced from a consideration of all the evidence that this libelant, Alfred Dillon, was mistaken when he said in his statement in evidence as Respondent's Exhibit A-1 that there was no defective equipment. The statement was a rather brief and undetailed statement of the occurrences. The statement contains assertions in the nature of conclusions, rather than a discussion and statement as to detailed facts.

However that may be, I think it reasonable to

conclude, as the Court does, that the witness was not at the moment he made that statement thinking of the winch. I believe he was thinking of the equipment which he himself personally, directly, was operating; the spreaders and equipment attached directly to the strongback which he was trying to assist in replacing in its seat in the hatch coaming.

The Court is convinced by a preponderance of the evidence and accordingly finds, concludes and decides that [281] this accident and the injuries received by libelant as a result thereof were proximately caused by the unseaworthiness of the ship, and by the negligence of the Rothschild Stevedoring Company in that the winches at the hatch where the libelant was working and in operation in connection with the job then being done had defective and insufficient equipment; namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of that strongback and the resulting crushing of the little finger on libelant's right hand and the finger next to that little finger, and also the tendons of the fingers and the flesh and tissues of those fingers.

The Court further finds, concludes and decides that these winch brakes had been in that unseaworthy and insufficient condition for some time, long enough for the shipowner to have discovered it and had time to have remedied and repaired the defect, and for a time long enough for the Rothschild Stevedoring Company to have by reasonable inspec-

tion ascertained and given attention to such unseaworthy and insufficient condition;

That the respondent United States of America is liable for the unseaworthiness of the ship caused by such unseaworthy and insufficient equipment in and about the winches and the winch brakes; and that third-party respondent Rothschild Stevedoring Company is guilty of [282] negligence in that it failed to exercise due and ordinary care in furnishing to libelant and those persons working with him a sufficient instrumentality reasonably safe and suitable for doing the work in which libelant and other employees of Rothschild Stevedoring Company were engaged at the time the accident occurred; and that such negligence on the part of Rothschild Stevedoring Company was a proximate cause of the accident and resultant personal injuries sustained by libelant;

That as between Rothschild Stevedoring Company and the United States of America, the former was entitled under the stevedoring contract to use the ship's winches supplied for the work by respondent United States of America; and that the negligence of the United States of America in comparison with the negligence of Rothschild Stevedoring Company was primary and that of Rothschild Stevedoring Company was passive; and that Rothschild Stevedoring Company is entitled to exoneration or reimbursement by respondent United States of America on account of any sums of money which Rothschild may be required to pay to libelant in discharge of

any judgment or decree which the Court may enter against Rothschild Stevedoring Company in favor of libelant.

The question of the amount of recovery in this case, more so than in the ordinary negligence case, is [283] troubling and more difficult of determination. In the first place, the Court believes from the evidence that libelant's physical appearance, demeanor and physical activities while he has been present in the courtroom during this trial clearly indicate that during the trial libelant has been subject to some health debility wholly unaccounted for by any injury of the kind, extent and nature received by him in connection with this accident.

I do not believe any man in ordinary health, at the age he was when he sustained his injuries in connection with this accident, would likely experience such an apparent debility as he now seems to be experiencing.

I am not convinced by the evidence before the Court nor by reason of what appears to be the libelant's general health condition that he would be entitled to recovery of any amount based on the normal expectancy of life of the average person of his age. Likewise, the Court is not convinced that all of the disability in his arm claimed by him is the result of the injuries which were caused by the accident to the two fingers in his right hand and to the tendons and flesh tissues in and about those fingers.

From the evidence and his demeanor, I do not believe that he has Volkmann's ischemia. Likewise, I do not believe that he is suffering from Dupuytren's contracture. I do believe that, by reason of the injuries sustained by [284] him to his little finger and the finger next to that in his right hand, he experienced some soreness for a long time in and about those fingers, and that in the process of favoring those fingers and giving up to the soreness in them he has experienced some stiffness in the joints of those and other fingers as clearly indicated by the appearance of the joints at the large knuckles in his hand, but that after this litigation is completed he very likely will, through exercise and normal and necessary use of his hand, recover some of that mobility which he normally before the accident enjoyed in the knuckle joints of his right hand.

I am so convinced because of the very telling evidence, which I regard as very significant, that he has experienced very little atrophy of the muscles in his arm above the elbow and in the forearm; also because of that condition described by Dr. O'Neil, the libelant's doctor, as a minor degree of muscular atrophy at the shoulder.

I do not believe that he has the limitation of muscular movement described by him, or which he apparently convinced his doctor, Dr. O'Neil, that he was afflicted with in his right arm.

Finally, I do not believe from the evidence and by his demeanor and appearance that libelant now is suffering from muscular contraction and restric-

tion of movement of which he complains. I believe from the evidence that a [285] very large percentage of his presently complained of symptoms of all kinds is due directly to his general health condition rather than to traumatic injury received by him in connection with this accident.

However, he has received disability causing him to be unable to work as a longshoreman as a result of this accident, and he did undoubtedly receive traumatic injury of the nature I have previously described; namely, fractures in the little or fifth finger and in the finger next to that (described as the fourth finger) and traumatic injury to the tendons and flesh tissues in and about those fingers. There is some doubt in my mind as to whether those fingers will ever be normal again. They may not be.

Considering all of the evidence in this case relating to the nature and extent of his injuries, and his appearance and demeanor in the courtroom, the Court finds, concludes and decides that the sum of \$7,500.00 is a reasonable and just sum to compensate the libelant for all of his injuries sustained as a direct and proximate result of the unseaworthy condition of the vessel and the negligence of the Rothschild Stevedoring Company;

That he is entitled to judgment and decree against the Rothschild Stevedoring Company and the United States of America jointly and severally for that sum, and that that sum is intended by the Court as compensation for all of his [286] special

and general damages sustained by him on account of the accident here involved.

As previously indicated by the Court, the Court further decides that while the libelant is entitled to recover against both of these respondents just named jointly and severally, nevertheless Rothschild Stevedoring Company is entitled to exoneration and indemnification from respondent United States of America in respect to any and all sums which Rothschild may have to pay the libelant, and that United States of America is the party ultimately liable for all of the injuries and damages sustained by libelant.

Further, the libelant is entitled to recover his taxable costs herein incurred from both respondents. The decision of the Court respecting indemnity in favor of Rothschild Stevedoring Company against United States of America applies to the costs as to all the other items of recovery.

It is the Court's finding, conclusion and decision that the libelant was at the time of the accident in the exercise of due and reasonable care for his own safety, and that he is not guilty of contributory negligence and did not assume any risks of the unseaworthiness of the vessel nor of the negligence of his employer, Rothschild Stevedoring Company.

(At 12:30 o'clock p.m., Saturday, July 9, 1949, trial proceedings concluded.) [287]

CERTIFICATE

I, Patricia Stewart, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ PATRICIA STEWART,
Official Court Reporter.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting as the apostles on appeal in the above entitled cause the following original pleadings and testimony together with Respondent's Exhibits A-1, A-2 and A-3, and Libelant's Exhibits 1 to 4, inclusive, and that said pleadings, documents and exhibits constitute the apostles on appeal from the Judgment and Decree filed and entered on July 25, 1949, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Libel in Personam.
2. Praecipe for Citation to Respondent.

3. Stipulation for Costs.
4. Marshal's Return on Citation (U. S. of America).
5. Appearance of Proctors.
6. Affidavit of Mailing Libel in Personam.
7. Praeceptum for Issuing Original and Three Copies of Citation to U. S. of America.
8. Appearance of Bogle, Bogle & Gates for Respondent, U. S. of America.
9. Answer.
10. Marshal's Return on Issuance of Citation to U. S. of America.
11. Appearance of Bogle, Bogle & Gates for Petitioner, U. S. of America.
12. Notice of Application for Order Impleading Third Party.
13. Order Allowing Third Party Petition.
14. Appearance of W. E. DePuis for Third Party Respondent.
15. Cost Bond.
16. Motion to Strike Third Party Petition of United States of America.
17. Brief.
18. Deposition Upon Oral Examination Before Trial of Alfred L. Dillon.

19. Marshal's Return on Citation on Third Party Respondent.
20. Deposition of James A. Steele.
21. Note for Hearing of Motion to Strike Third Party Petition.
22. Answer of Third Party Respondent.
23. Order Overruling Third Party Respondent's Motion to Strike Petition.
24. Deposition of Kristian Bauer.
25. Direct Interrogatories Propounded to Frank Palmer by Respondent, United States of America.
26. Praecipe to Issue Subpoena Duces Tecum for Dr. Edmund Smith and Seattle General Hospital.
27. Marshal's Return on Subpoena Duces Tecum to Seattle General Hospital.
28. Stipulation and Order for Consolidation of Causes.
29. Notice of Taking Deposition of Frank Palmer.
30. Statement of Points.
31. Brief of Libelant in Support of Judgment.
32. Brief of Respondent.
33. Court's Decision (Announced July 9, 1949).
34. Findings of Fact and Conclusions of Law.

35. Judgment.

36. Memorandum of Costs and Disbursements.

37. Petition for Appeal and Order for Appeal.

38. Praecipe for Apostles on Appeal.

39. Citation on Appeal.

40. Assignment of Errors.

41. Reporter's Transcript of Testimony in Proceedings.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 18th day of November, 1949.

/s/ MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12405. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Rothschild International Stevedoring Company, a corporation, Appellee, Apostles on Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

In Admiralty—No. 12405

UNITED STATES OF AMERICA,
Appellant,
vs.

ROTHSCHILD - INTERNATIONAL STEVE-
DORING COMPANY, a corporation,
Appellee.

APPELLANT'S DESIGNATION OF STATE-
MENT OF POINTS ON APPEAL

Appellant states that the only points to be reviewed on appeal of this cause to the United States Court of Appeals for the Ninth Circuit is the refusal of the trial court to grant the United States of America a judgment for the recovery over against Rothschild-International Stevedoring Company, a corporation, third party, either by way of full indemnity or contribution for the judgment entered in the above cause against the United States of America, in favor of libelant Alfred L. Dillon in the amount of \$7,500.00 and costs for personal injuries sustained by libelant, and the entry by the trial court of Findings of Fact and Conclusions of Law and Decree adjudging that appellee Rothschild-

International Stevedoring Company, a corporation,
was entitled to its costs against appellant.

Dated at Seattle, Washington, this 1st day of
December, 1949.

/s/ J. CHARLES DENNIS,

United States Attorney,
Proctors for Appellant United States of America.

Of Counsel:

BOGLE, BOGLE & GATES,

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 2, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF APOSTLES ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the
United States Court of Appeals for the Ninth
Circuit, San Francisco, California.

We hereby request that the Apostles on Appeal
in the above-entitled case shall include the follow-
ing:

- (1) Libel.
- (2) Answer.
- (3) United States of America's Third Party
Petition.
- (4) Order Allowing Third Party Petition.
- (5) Answer of Third Party Respondent.

(6) Testimony of all of the witnesses testifying in the trial of said cause except the following witnesses: Dr. Gordon B. O'Neil, Dr. H. T. Buckner and Martin O. Packard.

(7) Respondent's Exhibit A-2 (being Warship-steve Contract).

(8) Findings of Fact and Conclusions of Law.

(9) Decree.

(10) Transcript of Judgment showing satisfaction thereof by the United States of America.

(11) Petition for Appeal and Order on Appeal.

(12) Assignment of Errors.

(13) Citation and Service.

(14) Appellant's Statement of Points.

Of Counsel:

BOGLE, BOGLE & GATES,
/s/ J. CHARLES DENNIS,
United States Attorney,
Proctors for Appellant
U. S. A.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 2, 1949.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF APOSTLES
ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the
United States Court of Appeals for the Ninth
Circuit, San Francisco, California.

Appellee hereby requests that the Apostles on
Appeal in the above entitled case include all Apostles on Appeal designated by the appellant, United States of America, and in addition that the following be included by this counter designation:

(1) Testimony of the witness Martin O. Packard, who testified in the trial of said cause.

(2) Respondents' Exhibit A-1.

/s/ W. E. DuPUIS,
Proctor for Appellee Rothschild - International
Stevedoring Company.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 7, 1949.

In the United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROTHSCHILD - INTERNATIONAL STEVEDOR-
ING COMPANY, a corporation,

Appellee.

Appeal from the United States District Court
Western District of Washington,
Northern Division

BRIEF OF APPELLANT

J. CHARLES DENNIS,
United States Attorney

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,
(Of Counsel)

Proctors for Appellant

603 Central Building,
Seattle 4, Washington.

MAR 2 - 1950

PAUL P. O'BRIEN,
CLERK

In the United States
Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROTHSCHILD - INTERNATIONAL STEVEDOR-
ING COMPANY, a corporation,

Appellee.

Appeal from the United States District Court
Western District of Washington,
Northern Division

BRIEF OF APPELLANT

J. CHARLES DENNIS,
United States Attorney

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

INDEX

	Page
Statement Disclosing Jurisdiction	1
Statement of the Case	3
Evidence as to Duration of Slipping of Winches	4
Testimony of Government Witnesses	7
Lower Court's Findings of Fact	7
Specification of Error	8
Preliminary Statement	9
Status of Lower Court's Findings of Fact	9
Argument	10
I. The Proximate Cause of the Accident was Rothschild's Negligence in Permitting its Men to Work with Defective Winches	10
II. Liability of the United States	12
III. Rothschild's Contractual Liability	12
IV. The Failure of the United States to Main- tain a Seaworthy Winch was not the Prox- imate Cause of the Accident	15
V. The Arrow Case	16
VI. The United States is Entitled to Recovery Over from Rothschild of the Full Amount of the Judgment in Favor of Libelant	17
VII. Even if Fault on the Part of the Ship Could be held to have Contributed to the Accident, the United States is Entitled to Partial Recovery Over	20

TABLE OF CASES

	Page
<i>American Stevedores v. Porello</i> , 330 U. S. 446	23
<i>Austin El. Ry. Co. v. Faust</i> , (Tex. Civ. App., 1911) 133 S. W. 449, 453-454	20
<i>Barbarino v. Stanhope SS Co.</i> , (2 CCA, 1945) 151 F. (2d) 553	10, 22
<i>Bethlehem Shipbuilding Corp. v. Joseph Guttradt Co.</i> (9 CCA, 1926) 10 F. (2d) 769, 771	18
<i>Brooklyn v. Brooklyn City RR. Co.</i> , (1872) 47 N. Y. 475, 486	20
<i>Brooklyn District Eastern Terminal v. United States</i> , 287 U. S. 170, 77 L. ed. 240	9
<i>Carson v. Knight</i> , (Tex. Civ. App. 1926) 284 S. W. 617, 619	20
<i>Colorado & Southern Ry. Co. v. Western L. & P. Co.</i> , (1923) 73 Colo. 107, 214 Pac. 30	19
<i>Cornec v. Baltimore & O. RR. Co.</i> , (4 CCA) 48 F. (2d) 497	14
<i>Dunn v. Uvalde Asphalt Paving Co.</i> , 175 N. Y. 214, 67 N. E. 39	18
<i>Eastern Texas El. Co. v. Joiner</i> , (Tex. Civ. App., 1930) 27 S. W. (2d) 917, 918	20
<i>The Egyptian</i> , (1910) A. C. 400	16
<i>George A. Fuller Co. v. Otis Elevator Co.</i> , 245 U. S. 489	18
<i>Great Atlantic & Pacific Tea Co. v. Brasileiro</i> , (2 CCA) 159 F. (2d) 661	10
<i>Grillo v. Royal Norwegian Government</i> , (2 CCA) 139 F. (2d) 237	13
<i>Guy v. Donald</i> , (4 CCA, 1907) 157 Fed. 527, 530	18
<i>Hudson Valley Ry. Co. v. Mechanicsville E. L. & Gas Co.</i> , (1917) 180 App. Div. 86, 167 N. Y. S. 428	20
<i>Hutchinson v. Dickie</i> , (6 CCA) 162 F. (2d) 103	10
<i>Knippenberg v. Lord & Taylor</i> , (1920) 193 App. Div. 753, 184 N. Y. S. 785, 788	20

TABLE OF CASES (Continued)

	Page
<i>The Lewis Luckenbach</i> , (2 CCA, 1913) 207 F. 66	18
<i>The Mars</i> , (S. D. N. Y., 1914) 9 F. (2d) 183	15
<i>Minneapolis Mill Co. v. Wheeler</i> , (1883) 31 Minn. 121, 16 N. W. 698, 699	19
<i>Missouri K. & T. Ry. Co. v. Missouri Pacific Ry. Co.</i> , (1918) 102 Kans. 1, 175 Pac. 97	19
<i>Nashua Iron & Steel Co. v. Worchester & Nashua RR. Co.</i> , (1882) 62 N. H. 159	19
<i>Otis Elevator Co. v. Maryland Casualty Co.</i> , (1934) 95 Colo. 99, 33 P. (2d) 974, 977	19
<i>Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.</i> , (2 CCA, 1922) 281 Fed. 97, 108, certiorari denied 259 U. S. 586	18
<i>Parrish v. De Remer</i> , (1947) 117 Colo. 256, 87 P. (2d) 597, 607	19
<i>Portel v. United States</i> , (S. D. N. Y.) 1949 A. M. C. 487	23
<i>The Redwood</i> , (9 CCA, 1936) 81 F. (2d) 680	16
<i>Rich v. United States</i> , (2 CCA) 177 F. (2d) 688	19
<i>Seaboard Stevedoring Corp v. Sagadahoc Steam- ship Co.</i> , (9 CCA) 32 F. (2d) 886	14, 18
<i>Seas Shipping Co. v. Sieracki</i> , (1946) 328 U. S. 85 ...	12
<i>Standard Oil Co. v. Robins Dry Dock & R. Co.</i> , (2 CCA, 1929) aff'g 25 F. (2d) 339	18
<i>Stokes v. United States</i> , (2 CCA) 144 F. (2d) 82	23
<i>The Tampico</i> , (W. D. N. Y., 1942) 45 F. Supp. 174 ...	21
<i>United States v. Arrow Stevedoring Company</i> , (9 CCA) 175 F. (2d) 329	12, 16, 17
<i>United States v. Lubinski</i> , 153 F. (2d) 1013	9
<i>United States v. Wallace</i> , (9 CCA) 18 F. (2d) 20	14
<i>Vanderlinden v. Lorentzen</i> , (2 CCA) 139 F. (2d) 995	13
<i>Washington Gas Light Co. v. District of Columbia</i> , 161 U. S. 316	18

STATUTES

	Page
New Title 28, §1293, §2107	2
33 U.S.C.A. §933	2
46 U.S.C.A. § 742 et seq	2

TEXTS

Restatement of Restitution, Sec. 95, 97	18, 20
Restatement of Torts, Sec. 441	15

In the United States Court of Appeals

For the Ninth Circuit

No. 12405

UNITED STATES OF AMERICA,

Appellant,

vs.

ROTHSCHILD - INTERNATIONAL STEVEDOR-
ING COMPANY, a corporation,

Appellee.

**Appeal from the United States District Court
Western District of Washington,
Northern Division**

BRIEF OF APPELLANT

STATEMENT DISCLOSING JURISDICTION

This is an appeal from a decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam by Alfred L. Dillon, a stevedore employed by Rothschild-International Stevedoring Company, a corporation, against the United States of America as respondent, seeking recovery of damages in the amount of \$50,000.00 for personal injuries sustained on the government operated vessel, SS "GOUCHER VICTORY."

(Aps. 2) The United States impleaded Rothschild-International Stevedoring Company, a corporation, as third party respondent pursuant to Admiralty Rule 56, seeking recovery of full indemnity or contribution in the event the United States were held liable to libelant for damages.

The trial court entered a decree against the United States and in favor of libelant in the amount of \$7,500.00. (Aps. 24) Although the trial court found libelant's injuries were due to a slipping of the winches at No. 1 hatch, which condition existed long enough to charge both the United States and Rothschild-International Stevedoring Company with knowledge of the defective condition, (Aps. 20-21) it dismissed the third party petition of the United States against Rothschild, (Aps. 25) from which provision of the decree the United States prosecutes this appeal. Rothschild-International Stevedoring Company, third party respondent, has not cross-appealed. The United States has paid libelant the amount of damages awarded in his favor by the decree.

This action of a maritime nature is governed by the Longshoremen's and Harbor Workers' Act, (33 U. S. C. A. § 933) and by the Suits in Admiralty Act, (46 U. S. C. A. § 742 et seq.). It was properly brought in the District Court (46 U. S. C. A. § 742). From a final decree denying the United States recovery against Rothschild, impleaded third party respondent, an appeal lies to this court. (New Title 28, § 1293, § 2107).

STATEMENT OF THE CASE

Shortly prior to libelant's injury the SS "GOUCHER VICTORY" was drydocked in Seattle, Washington for repairs. Upon completion, the vessel docked at the Seattle Army Port of Embarkation on May 10, 1946 to load supplies and troops for a trip to Japan. The vessel was equipped with electric winches (Aps. 171, 172)

Rothschild-International Stevedoring Company, a corporation, stevedored the vessel for the government under the standard cost-plus Warshipsteve contract. (Respondent's Exhibit A-2, Aps. 205-250). It began its loading operations at No. 1 hatch on May 11, 1946. (Aps. 173) No work was done Sunday, May 12, 1946. Stevedoring was resumed Monday, May 13, 1946, the day of libelant's injury.

Libelant went to work on the night shift at 6:30 p. m. under the general supervision of Petri, Rothschild's foreman. The only ship's personnel on duty that night were Night Mate Louis Ness (Aps. 121) and Assistant Electrician Palmer. It was the latter's duty to assist in keeping the winches in working order. (Aps. 137)

Libelant's injury occurred about 9:30 P. M. in No. 1 hatch tween deck where he had been employed all evening. The lower court found it happened as follows:

"That on or about the 13th day of May, 1946, at about the hour of 9:30 p. m., the libelant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 Hold and

was in the act of guiding a strong-back into the slot provided as a resting place for said strong-back on the port coaming of said deck, and that while using due care and caution on libelant's part, the said strong-back suddenly and without warning fell and caught libelant's right hand injuring it as hereinafter more fully set out." (Aps. 20).

EVIDENCE AS TO DURATION OF SLIPPING OF WINCHES

Libelant testified that prior to his accident the winches in No. 1 hatch had slipped "quite a few loads" (Aps. 70) and he had called up to the stevedores on deck to get somebody to fix them. (Aps. 70)

Rigney, Rothschild's winch driver, testified when he first went to work that night, as was the usual custom, he tested the winches and found them satisfactory. (Aps. 97) He first noticed the winches slipping at 7:30 p. m. and claims he reported their defective condition to Sellman, the hatch tender, and expected Sellman would report it to Petri, Rothschild's foreman. (Aps. 98) Rigney testified that a man whom he vaguely thought was a member of the ship's crew "came round and tinkered with the winches." (Aps. 98)

Rigney stated that the winches next slipped at 8:40 p. m. and he again reported their defective condition to Sellman. (Aps. 99) He stated after the second episode, a crew member "merely looked at the winches." (Aps. 100) After libelant's accident, Rigney testified the winches were stopped and adjusted but the slipping condition continued for the balance of the night. (Aps. 113)

Sellman, Rothschild's hatch tender, testified the winches slipped the previous trip of the "GOUCHER VICTORY" and he had then reported the matter to the ship's electrician. (Aps. 107) He states he operated the winches prior to libelant's accident and warned Rigney that the port winch was defective. (Aps. 108, 109)

Sellman admitted that as hatch tender he was in charge of the stevedores under Petri, Rothschild's foreman. (Aps. 111) Although admittedly aware of the defective condition of the winches on the previous voyage of the "GOUCHER VICTORY," he confessed he made no special test or inspection of the winches before sending the stevedores to work in No. 1 hatch. (Aps. 111)

Sellman stated that the winches slipped at No. 1 hatch a dozen times that night before libelant's injury. (Aps. 112) His indifferent attitude as a Rothschild supervisor toward the safety of libelant and the other stevedores under his immediate supervision is reflected by the following excerpts from his testimony:

"Q. Was it a matter of any importance to you?

"A. Not an awful lot, as long as it didn't spill any loads or land a load on anybody." (Aps. 112)

* * *

"Q. Wouldn't you if you felt it was dangerous or hazardous?

"A. I tried it the previous trips and didn't get any results. I know on these Army ships, it is no use." (Aps. 112)

* * *

“Q. As a matter of fact, as a member of the Longshoreman’s Union, you have a contract that you are not permitted or required to work under unsafe conditions?

“A. That’s right.

“Q. If you find winches are unsatisfactory or unsafe, you close the job down until they are repaired?

“A. Well, not unless they are awful bad. Otherwise, we would be going home pretty early pretty often.” (Aps. 113)

Sellman admitted he did not report the defective condition of the winches to any of the ship’s personnel or his foreman, Petri.

“Q. But you yourself in charge of the gang made no complaint either to Mr. Petri or to any of the ship’s officers about the alleged condition of this winch?

“A. I don’t think I did that night. I don’t remember of it, anyway.” (Aps. 113)

Petri, Rothschild’s foreman, did not recall if the winches were tested before use that night. (Aps. 185) Neither Rigney, Sellman nor anyone else reported any slipping of the winches to him before libelant’s accident, nor did he observe any defect in their operation. Had he been warned of the defective condition of the winches at No. 1 hatch, Petri stated he would have called the electrician aboard the vessel to adjust the defects. (Aps. 186) Petri defined his obligation as foreman to Rothschild’s employees in the presence of defective winches as follows:

“Q. If those winches had been unsatisfactory at any time or unsafe or defective, what would you have done as foreman for Rothschild Stevedoring Company?

“A. I would have reported it, went to the First Mate or the electrician on the ship.

“Q. And if they could not have been repaired satisfactorily, what would you have done?

“A. We wouldn’t operate them.

Mr. Franklin: That is all.” (Aps. 197)

TESTIMONY OF GOVERNMENT WITNESSES

Chief Mate Bauer and Chief Electrician Steele, who left the vessel at 5:00 p. m. the night of libelant’s injury, observed the operation of the winches at No. 1 hatch that day and they operated normally. (Aps. 174-Aps. 147)

Night Mate Ness was on duty the night of libelant’s injury, as was Assistant Electrician Palmer, the latter for the express purpose of servicing the winches. Both testified no complaints were made to them of any defective condition of the electric winches. (Aps. 174-Aps. 138, 139)

LOWER COURT’S FINDINGS OF FACT

Despite this evidence, the lower court entered the following findings of fact:

VI.

“That the said injuries to libelant were proximately caused by the unseaworthiness of the said

ship, and by the passive negligence of the Rothschild-International Stevedoring Co., in that the winches at the hatch where the libelant was working and in operation in connection with the job being done had defective and insufficient equipment, namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of said strong-back and the resulting crushing of the little finger on libelant's right hand and the finger next to that little finger, and also the tendons of the said fingers and the flesh and tissues of the said fingers.

VII.

“That the winch brakes in question had been in that unseaworthy insufficient condition for some time, long enough for the respondent, United States of America, to have discovered it and had time to have remedied it and repaired the said defect, and for a time long enough for the Third Party Respondent, Rothschild-International Stevedoring Co. to have, by reasonable inspection, ascertained and given attention to such unseaworthy and insufficient condition.” (Aps. 20-21)

The lower court in its decree dismissed the government's impleading petition against Rothschild for indemnity or contribution. (Aps. 23)

SPECIFICATION OF ERROR

The District Court erred:

1. In refusing to grant petitioner and respondent United States of America recovery over either by way of full indemnity or contribution against Rothschild-International Stevedoring Company, a corporation, third party respondent, for the amount of judgment and costs decreed against respondent and petitioner in favor of libelant Alfred L. Dillon.

2. In entering Findings of Fact and Conclusions of Law and decreeing that third party respondent Rothschild-International Stevedoring Company, a corporation, was entitled to its costs against petitioner and respondent United States of America. (Aps. 28-29)

PRELIMINARY STATEMENT

Both Assignments of Error raise a single question, namely the error of the lower court in refusing to grant appellant, United States, indemnity or contribution against Rothschild. The assignments will be argued together.

An appeal from the decree of the trial admiralty Judge to the Circuit Court of Appeals is a trial de novo.

Brooklyn District Eastern Terminal v. United States, 287 U. S. 170, 77 L. ed. 240.

STATUS OF LOWER COURT'S FINDINGS OF FACT

In this case the lower court heard evidence both orally and by deposition during the trial of the case. The weight to be accorded such findings were stated by this court in the case of *United States v. Lubinski*, 153 F. (2d) 1013, as follows:

“As in the case of *Matson Navigation Company v. Pope & Talbot, Inc.*, 9 CCA, 1945, 149 F. (2d) 295, the testimony was partly oral and partly by deposition, and, as we hear the case de novo, we give weight to the findings of the trial court as our judicial discretion dictates.”

Moreover, findings concerning negligence such as are here in question are not findings of fact in the true sense so as to be binding unless clearly erroneous. They are mere factual conclusions respecting a standard of conduct and are reviewable as a matter of law.

Great Atlantic & Pacific Tea Co. v. Brasileiro, (2 CCA) 159 F. (2d) 661.

Hutchinson v. Dickie, (6 CCA) 162 F. (2d) 103.

Barbarino v. Stanhope SS Co., 151 F. (2d) 553.

ARGUMENT

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS ROTHSCHILD'S NEGLIGENCE IN PERMITTING ITS MEN TO WORK WITH DEFECTIVE WINCHES.

The findings of the lower court that the defective condition of the winches was known to the United States prior to Dillon's injury in sufficient time to remedy the defects and that Rothschild's reckless and negligent conduct in requiring its employees to work with full knowledge of the defective condition of the winches amounted to only passive negligence on Rothschild's part have no support either in the evidence or law.

The testimony establishes indisputably that the defective condition of No. 1 winch was not known either to Night Mate Ness or Assistant Electrician Palmer, employees of the United States and on duty the night

of the accident. The testimony of Chief Mate Bauer and Chief Electrician Steele establishes that the vessel's winches at No. 1 hatch functioned perfectly both before and after Dillon's injury and were given reasonable inspection.

The testimony further conclusively shows that the defective condition of the winches was observed by Rigney, the winch driver, about 7:30 p. m., two hours before Dillon's accident, and Rigney claims he reported the matter to his supervisor, Sellman, the hatch tender, and expected him to notify the necessary parties to make the needed repairs.

Sellman, Rothschild's supervisor and hatch tender, was extremely derelict in his duty. With the claimed knowledge of the previous defective condition of these winches on the prior voyage of the SS "GOUCHER VICTORY," he made no detailed inspection of the winches when the gang went to work the night of Dillon's injury. After observing the winches slip a "dozen times" prior to Dillon's injury imperiling the safety of the stevedores in the hatch, Sellman not only failed to order the men to stop working until the winch defects had been repaired (which conduct common sense and prudence demanded) but further failed to report the dangerous condition of the winches before Dillon's injury either to Petri, Rothschild's foreman, or to Night Mate Ness or Assistant Electrician Palmer, so the defects could be remedied. This callous and recklessly negligent conduct of Sellman, Rothschild's supervisor

and hatch tender, in needlessly exposing Dillon and the other stevedores to the hazards of a defective winch for over three and one-half hours was the active and proximate cause of Dillon's accident. As Petri testified, ordinary safe practices would dictate that defective winches be stopped until repaired. Sellman admitted under the stevedore Union contract, stevedores are not permitted to work in unsafe surroundings.

II.

LIABILITY OF THE UNITED STATES

The United States as shipowner was under a non-delegable duty to furnish Dillon, a stevedore, a seaworthy ship and a safe place in which to work. *Seas Shipping Co. v. Sieracki*, (1946) 328 U. S. 85. This obligation it unknowingly breached.

This court said in the recent case of *United States v Arrow Stevedoring Company*, (9 CCA) 175 F. (2d) 329,

“It is not questioned that though the unseaworthy condition arising from the negligent use of the hatch cover was not caused by the government's fault, it is nevertheless liable.”

The liability of the United States to the stevedore is akin to that of an insurer.

III.

ROTHSCHILD'S CONTRACTUAL LIABILITY

Rothschild specifically stipulated under the terms of the Warshipsteve contract that it would perform its contract with the United States “in accordance with the

best operating practices, to exercise due diligence to protect and safeguard the interests of the Administrator (United States War Shipping Administration) in all respects and to avoid any delay, loss or damage whatsoever to the Administrator.” (Part 1, Clause 1) (Aps. 202)

Thus, Rothschild undertook to stevedore the vessel properly and safely without any aid or assistance from government personnel. It obligated itself not to heedlessly and recklessly expose its employees to the hazards of defective winches. By its contract, it took over completely the performance of the stevedoring work on the “GOUCHER VICTORY” under the legal duty of exercising a high degree of professional skill and competence. This obligation Rothschild breached by permitting its employees to continue working in the immediate vicinity of winches which Rothschild (and not the United States) knew were defective and likely to cause injury. Obviously, the United States had no reason to believe that Rothschild, an old and well established stevedore, would heedlessly expose its employees to danger in performing its contract with the government.

It is well established that the stevedore contractor owes a duty to inspect the ship’s appliances in order to ascertain whether or not they are in safe condition for the stevedores to use them. *Vanderlinden v. Lorentzen*, (2 CCA) 139 F. (2d) 995. *Grillo v. Royal Norwegian Government*, (2 CCA) 139 F. (2d) 237.

This court in *United States v. Wallace*, (9 CCA) 18 F. (2d) 20, stated:

“In going on the ship to do the work, and in using its tackle, the contractor had to take them as he found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe.”

When inspection established the winches were defective, work should have been stopped for repairs, and the men withdrawn from an area of danger. The United States was under no duty to inspect the winches while Rothschild was using them. This was Rothschild's duty.

In *Seaboard Stevedoring Corp. v. Sagadahoc Steamship Co.*, (9 CCA) 32 F. (2d) 886, this court said:

“We are aware of no rule under which the ship's officer's should be required for appellant's (stevedore's) benefit to exercise a high degree of vigilance to see that it performs a plain duty.”

As the court observes in *Cornec v. Baltimore & O. RR. Co.*, (4 CCA) 48 F. (2d) 497, the stevedore owes the vessel and her owners the duty of using due care; the latter owes no such duty to the stevedore.

It is thus established that Rothschild owed the United States a contractual duty to exercise due care not to expose its stevedores to dangerous working conditions, which obligation it breached by permitting Dillon to work with a defective winch.

IV.

THE FAILURE OF THE UNITED STATES TO MAINTAIN A SEAWORTHY WINCH WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT

In permitting its employees to work in the hatch with knowledge of the defective winches (not shared in by the United States) there can be no doubt that such negligent conduct by Rothschild was the active, sole and intervening proximate cause of Dillon's injury.

The principle involved is elementary. In *Restatement of Torts*, Section 441, it is stated:

“(2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actors' negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence.”

The cases supporting this clause of the *Restatement* are legion. One of the most famous admiralty cases of this character is *The Mars*, (S.D. N.Y. 1914) 9 F. (2d) 183, a decision by Judge Learned Hand, who said of a similar cases where the dominant cause was the superseding negligence of the party seeking to charge the other with liability:

“It may be thought that this was a proper case for dividing damages. * * * I think not. I take it

that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

That has been the rule in several admiralty cases.

The Egyptian (1910), A. C. 400.

Compare, *The Redwood* (9 CCA, 1936), 81 F. (2d) 680, where this court denied recovery for a total loss of a vessel injured in collision on the ground that the proximate cause of the loss was the attempt of the libellant to tow his boat to port rather than to beach her in safety.

V.

THE ARROW CASE

This court has recently held in *United States v. Arrow Stevedoring Company*, supra, that almost identical conduct by the stevedore to that of Rothschild's at bar was the proximate cause of a stevedoring injury. In that case this court held Arrow, the stevedore, was wantonly negligent in permitting its employees to work in the vicinity of an improperly secured hatch cover. The court said:

"Arrow (stevedore) owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed."

The court further said:

“On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door which otherwise could have been made secure in the usual manner described by Arrow’s Larsen. *Seaboard Stevedoring Company v. Sagadahoc SS Co.*, 32 F. (2d) 886, *Bethlehem Shipbuilding Co. v. Joseph Gutradt Co.* 10 F. (2d) 769, 771 (Cir. 9); *The Mars*, 8 F. (2d) 193, 184. Learned Hand, D. J.”

In the *Arrow* case, this court reversed findings of the District Court exculpating the stevedore from a charge of negligence. Applying the *Arrow* rule to the facts of the case at bar, the findings of the lower court are obviously erroneous in failing to find Rothschild’s negligent conduct in permitting Dillon to work with knowledge of the defective winches, the active and proximate cause of Dillon’s injury.

VI.

THE UNITED STATES IS ENTITLED TO RECOVERY OVER FROM ROTHSCHILD OF THE FULL AMOUNT OF THE JUDGMENT IN FAVOR OF LI-BELANT

Rothschild’s contractual duty to the United States to stevedore the vessel in a proper and workmanlike manner was breached when Dillon and other stevedores were permitted to work in the No. 1 hatch in close proximity to the slipping and defective winch, which fact was fully known to Rothschild and unknown by the United States. The United States is therefore entitled to full indemnification from Rothschild under well established principles of law, for the full damage it sus-

tained, despite the initial breach by the United States of its non-delegable duty to Dillon to furnish him with a safe place in which to work.

The United States' right to recovery over of full indemnity and contribution from Rothschild is implied in the law in its favor by reason of employing Rothschild to perform services requiring specialized skill and the subsequent negligence of Rothschild's employees imposing loss or damage upon the United States. *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 67 N. E. 39; *George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489; *Restatement of Restitution*, Sec. 95, 97.

A similar right is implied whenever one has undertaken to protect the interests of another and negligently fails to do so. *Washington Gas Light Co. v. District of Columbia*, 161, U. S. 316.

This rule has been applied in the following admiralty cases:

Seaboard Stevedoring Corp. v. Sagadahoc SS Co., (9th Cir., 1929), 32 F. (2d) 886.

Bethlehem Shipbuilding Corp. v. Joseph Guttradt Co. (9th Cir., 1926), 10 F. (2d) 769, 771.

The Lewis Luckenbach (2nd Cir., 1913), 207 Fed. 66.

Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co. (2nd Cir., 1922), 281 Fed. 97, 108, certiorari denied 259 U. S. 586.

Standard Oil Co. v. Robins Dry Dock & R. Co. (2nd Cir., 1929), aff'g 25 F. (2d) 339.

Guy v. Donald (4th Cir., 1907), 157 Fed. 527, 530.

In the recent admiralty case of *Rich v. United States*, (2 CCA) 177 F. (2d) 688, this duty of the stevedore to indemnify the United States in a situation comparable to the case at bar was again recognized. The government's right to implead the contractor for indemnification purposes for its negligence was sanctioned. The court said:

“If it should turn out that the libelant's injuries were primarily caused by the negligence of his employer in fastening the ladder insecurely for this use, the United States would have a cause of action against the employer based upon the latter's independent duty to indemnify it for any loss sustained by the libelant's election to sue it for injuries. * * *”

The right of the United States to recovery over against Rothschild is essentially based upon the fact that Rothschild had the last clear chance by simply performing its professional duty of due care to avoid causing injury to Dillon and thereby imposing loss upon the United States.

Otis Elevator Co. v. Maryland Casualty Co., (1934) 95 Colo. 99, 33 P. (2d) 974, 977.

Colorado & Southern Ry Co. v. Western L. & P. Co., (1923) 73 Colo. 107, 214 Pac. 30.

Parrish v. De Remer, (1947) 117 Colo. 256, 187 P. (2d) 597, 607.

Nashua Iron & Steel Co. v. Worchester & Nashua RR. Co., (1882) 62 N. H. 159.

Missouri K. & T. Ry. Co. v. Missouri Pacific Ry. Co., (1918) 102 Kans. 1, 175, Pac. 97.

Minneapolis Mill Co. v. Wheeler, (1883) 31 Minn. 121, 16 N. W. 698, 699.

Knippenberg v. Lord & Taylor, (1920) 193 App. Div. 753, 184 N. Y. S. 785, 788.

Hudson Valley Ry. Co. v. Mechanicsville E. L. & Gas Co., (1917) 180 App. Div. 86, 167 N. Y. S. 428.

Brooklyn v. Brooklyn City R.R. Co., (1872) 47 N. Y. 475, 486.

Eastern Texas El. Co. v. Joiner, (Tex. Civ. App., 1930) 27 S. W. (2d) 917, 918.

Carson v. Knight, (Tex. Civ. App., 1926) 284 S. W. 617, 619.

Austin El. Ry. Co. v. Faust, (Tex. Civ. App., 1911) 133 S. W. 449, 453-454.

Restatement of Restitution, § 95, 97.

We respectfully submit that even if the United States and Rothschild were both guilty of mutual negligence, the United States is entitled to full recovery over of indemnity and contribution from Rothschild under the facts of this case and the decree of the lower court exonerating Rothschild should be reversed.

VII.

**EVEN IF FAULT ON THE PART OF THE SHIP
COULD BE HELD TO HAVE CONTRIBUTED TO
THE ACCIDENT, THE UNITED STATES IS ENTI-
TLED TO PARTIAL RECOVERY OVER.**

In the event that the court should find that the negligence of Rothschild's employees was not a supervening, active or dominant cause of Dillon's injury, but the fault of the ship equally operated to cause the injury, the United States would be entitled to partial recovery over from Rothschild under the federal maritime law.

The best formulation of the federal maritime law on the point is contained in the case of *The Tampico*, (W. D. N. Y., 1942), 45 F. Supp. 174. There a longshoreman sued a barge owner for injuries caused jointly by the defective condition of the barge and the negligence of his fellow employees. Libelant was held entitled to recover the full amount of his damages from the barge owner and the barge owner, having been found equally at fault, was in turn allowed recovery over to the extent of one-half against the libelant's employer. The court said (pp. 175-176):

“The libelant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libelant's injuries, to the full extent of his damages. *The Hamilton*, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; *The Atlas*, 93 U. S. 302, 23 L. Ed. 863. Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. ‘The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (Citation.) Whatever its origin, the admiralty rule in this country is well known to be the other way. (Citations.) * * *’ *Erie R. R. Co. v. Erie Transportation Co.*, 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., is immune from suits for damages resulting from libelant's injuries brought by the libelant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. *Erie R. R. Co. v.*

Erie Transportation Co., *supra*, 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libellant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasons. *Briggs v. Day*, D. C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. § 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See *Aktieselskabet Cuzco v. The Sucarseco, et al.*, 294 U. S. 394, 400, 55 S. Ct. 467, 79 L. Ed. 942, and cases cited."

Again, *Barbarino v. Stanhope* (2 CCA 1945), 151 F. (2d) 553, reversed a District Court decree dismissing the petition impleading a stevedore in a case where a longshoreman was injured because of a defective bolt and the shipowner sought to hold the stevedore for the negligence of its foreman in permitting libellant to expose himself to the dangerous condition. There, unlike here, the defective condition was unknown by the stevedore's foreman, yet the court recognized that liability over would exist, for the court said: (p. 555)

"It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means."

Where the fault of both parties contributed to an injury, the law applicable to a maritime transaction of

the United States limits such indemnity to proportionate contribution. *American Stevedores v. Porello*, 330 U. S. 446; *Portel v. United States* (S. D. N. Y.) 1949 A. M. C. 487; *Stokes v United States*, (2 CCA) 144 F. (2d) 82.

Upon the basis of comparative negligence the degree of fault apportioned to the United States should be nominal. The United States technically breached its warranty of seaworthiness to Dillon. It had no knowledge of the defective condition of the winch at No. 1 hatch, either before or after Dillon's injuries. This knowledge was possessed solely by Rothschild, who failed to warn its employees of the dangers involved or stop the hatches for repairs or notify the ship's personnel of the necessity of making such repairs, but in total disregard of its contractual obligation to stevedore the "GOUCHER VICTORY" with professional skill and care, negligently and wantonly permitted Dillon and his fellow employees to work in the vicinity of defective winches for a period of three and one-half hours until Dillon was injured.

Such reckless and negligent conduct on the part of Rothschild calls for the maximum apportionment of fault to it for the responsibility of Dillon's accident.

For the foregoing reasons, we respectfully ask this court to reverse the findings of fact, conclusions of law

and decree of the trial court and to grant the United States full indemnity over or contribution against appellee Rothschild-International Stevedoring Company.

Respectfully submitted,

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Proctors for Appellant.

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

ROTHSCHILD-INTERNATIONAL STEVEDORING
COMPANY, a corporation,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT, WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

W. E. DU PUIS,
Proctor for Appellee

816 Northern Life Tower
Seattle 1, Washington

FILED
APR -7 1950

PAUL P. O'BRIEN,

IN THE UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

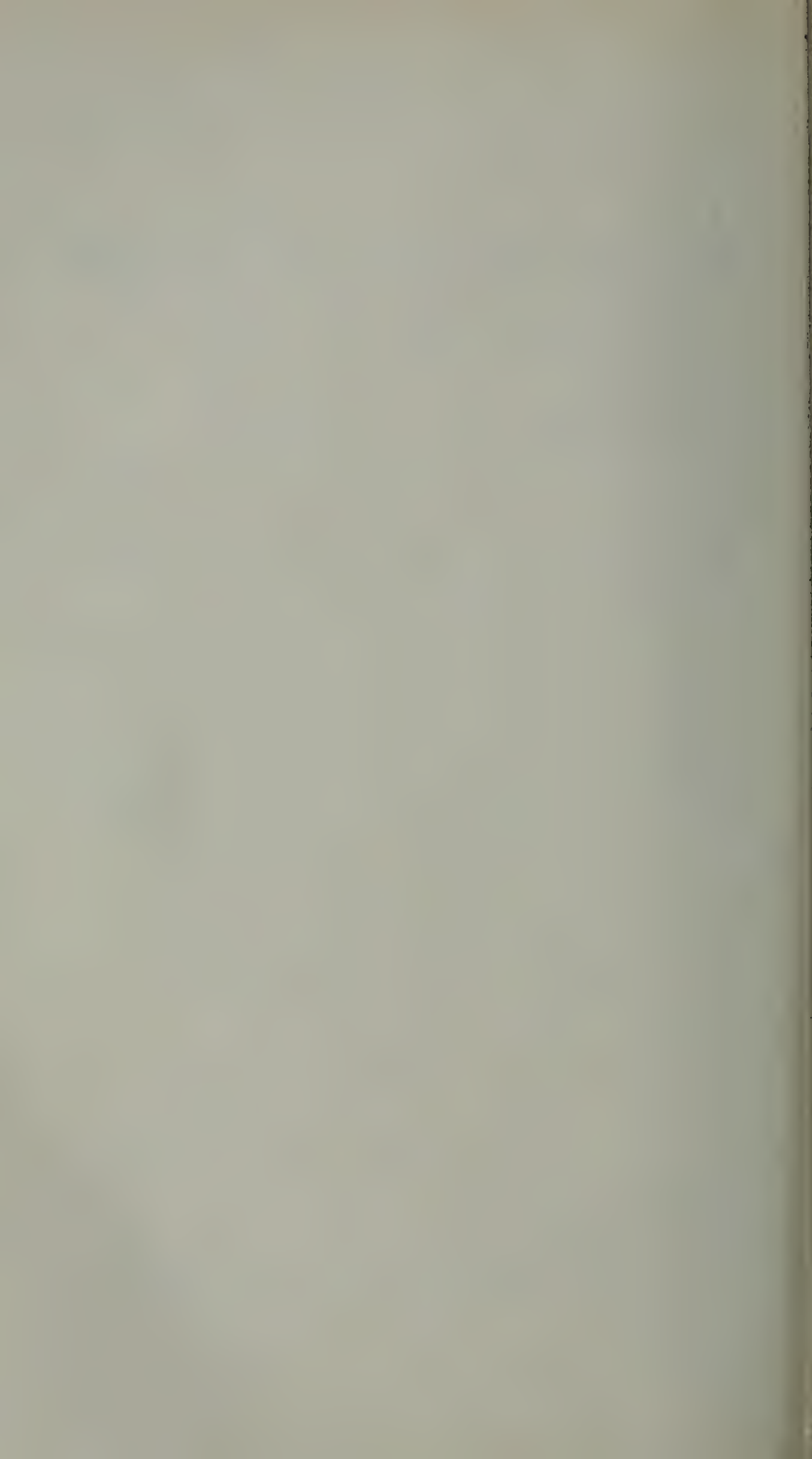
ROTHSCHILD-INTERNATIONAL STEVEDORING
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INDEX

Table of Cases.....	iv
Statement of the Case.....	1
Evidence of Complaints made by Stevedores.....	10
Testimony of Government Witnesses.....	12
The District Court's Findings of Fact as bearing upon the Accident.....	14
Effective Appeal from the Decree of an Admiralty Trial Judge	16
Conclusiveness of Findings of the Trial Court.....	17
Argument	
I. The Proximate Cause of the Accident was the negligence of the operator of the ship in allow- ing a complicated and intricate mechanism such as the automatic braking device on the winch to become and remain dangerously defective, even after receiving complaints by the stevedores.....	18
II. The stevedores did not have any prior actual knowledge on the night in question of the par- ticular mechanical defect which brought about this accident	23
III. Answer to argument of the appellant.....	27
IV. The Arrow case is not in point.....	29
Conclusion	36

TABLE OF CASES

"The Andrea F. Luckenbach" (CCA9) 78 F(2) 827.....	17
U. S. v. Arrow Stevedoring Co. (CCA9) 175 F(2) 329..	29-34
"The Beaver" (CCA9) 253 F 312.....	18
"The Bergen" (CCA9) 64 F(2) 877.....	17
"The Catalina" (CCA9) 95 F(2) 283.....	17, 18
Crowley Launch & Tugboat Co. v. Wilmington Trans- portation Co. (CCA9) 117 F(2) 651.....	18
"The Golden Star" (CCA9) 82 F(2) 687.....	17
"The Heranger" (CCA9) 101 F(2) 953.....	17
"The Hardy" (CCA9) 229 F 985.....	18
"The John Twohy," 255 U. S. 77, 79; 41 S. Ct. 251; 65 L. Ed. 511.....	16
"The Lidia" (CCA2) 1 F(2) 18.....	16
"The Mazatlan" (CCA9) 287 F 873.....	18
Olsen v. Alaska Packers Assn. (CCA9) 114 F(2) 364....	16
"The Redwood" (CCA9) 81 F(2) 680.....	17
Rich v. U. S. (CCA2) 177 F(2) 688.....	35
Seas Shipping v. Sieracki (1946), 328 U. S. 85.....	26
Siciliano v. Calif. Sea Products Co. (CCA9) 44 F(2) 784..	18
Sorensen v. Alaska S. S. Co. (CCA9) 247 F(2) 294.....	18
Standard Oil Co. v. So. Pac. Co., 268 U. S. 146, 155; 45 S. Ct. 465; 69 L. Ed. 890.....	16
"The Townsend" (CCA2) 29 F(2) 491.....	16
Wandtke v. Anderson, et al (CCA9) 74 F(2) 381.....	17

IN THE UNITED STATES
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COMPANY, a corporation,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT
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NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

On or about the 13th day of May, 1946, at about the hour of 9:30 p.m., Libelant Alfred L. Dillon was injured while in the course of his employment in the tween decks of

the No. 1 hold on the S.S. "Goucher Victory" which was loading on the north side of pier 38 in Seattle, Washington.

When the accident causing injuries to the Libelant occurred, he was in the act of guiding a strong-back into the slot on the port coaming of the deck.

The strong-back suddenly gave way and fell, pinning the Libelant's right hand.

Libelant was employed by Rothschild-International Stevedoring Co., a corporation, who were stevedoring the vessel for the government under a standard contract which is marked as Respondents' exhibit A-2 (Aps. 205-250).

Libelant went to work on the night shift about 6:30 p.m. This shift was under the general supervision of Jacob Petri, Rothschild's foreman.

The "Goucher Victory" was equipped with electric winches (Aps. 137). It was the duty and the job of the Ship's chief electrician and his assistant to maintain the winches, to make the necessary repairs and adjustments (Aps. 142). The evidence showed and the court found that on or about the 13th day of May, 1946, at about the hour of 9:30 p.m., the Libelant Alfred Dillon, while in the course of his work, was standing in the tween decks of the No. 1 hold and was in the act of guiding a strong-back into the slot. The hatch tender gave the signal to the winch driver, Mr. Rigney, to "come back" with it; that means to lower it.

The brake didn't hold and it fell. Quoting the testimony of the winch driver, as follows:

"Q. Will you state the course of the movement of the strong-back from the time it left the poopdeck until it was brought down to the tween deck hold?

A. Yes. They had to hook it up with the spreaders, had to lift it, lower it down to the lower tween decks where I was given the signal to come down with it. Then I was stopped, then they gave me another signal to come back, and then the brake didn't hold and bam, down she went." (Aps. 93.)

.

"Q. What happened? You say she dropped down?

A. Yes.

Q. What happened?

A. The brake didn't hold. Sometimes your points don't catch and you jump them points and it releases itself automatically. Don't do it all the time, though." (Aps. 94.)

The longshoremen had experienced difficulty with these particular winches on several prior occasions on that evening and they had made complaints. Someone came and looked at the winches and did something to them on both occasions. The winch driver thinks it was the deck engineer.

"Q. Had you had any difficulty with the winches prior to that time?

A. Yes, sir.

Q. Just state what difficulty you had.

A. Well, the brakes didn't hold on two occasions.

Q. What happened when they didn't hold?

A. You come back and it seemed like she jumped the points and bam, she'll go right back.

Q. Did you make any complaint?

A. Yes, sir.

Q. Before this accident?

A. Yes, sir, twice." (Aps. 94 and 95.)

The evidence showed that the stevedores made complaints about the fact that the winches and the brake were not operating properly and that on both occasions someone from the ship whom the winch driver thought was the deck engineer came and did some work on the winches. From the testimony it is conclusive that complaints were made by the winch driver on at least two occasions on the evening prior to the injury of Mr. Dillon (Aps. 95 and 97). It is also in the evidence that as a result of these complaints, the winches were examined or checked by someone representing the Ship (Aps. 95 and 98).

The Stevedores do not maintain or repair the winches. The inference from the evidence is that they have no right to tamper with this equipment (Aps. 96).

The winch driver testified as follows in part:

“Q. You say you noticed something occurring at 7:30?

A. Yes, sir.

Q. What was that?

A. The same thing that happened when I was lowering the beam.

Q. What was it happened at 7:30?

A. Slipping of the brake.” (Aps. 97 and 98.)

.

“Q. Was any thing done at 7:30 with reference to any repairs conducted on them?

A. Yes. A man came around and tinkered around with them winches.” (Aps. 98.)

.

“Q. When was the next time there was anything wrong with this?

A. About 20 minutes to nine, or somewhere in there.

.

Q. What happened then?

A. The same thing.

Q. What did you do then?

A. We stopped again.” (Aps. 99.)

.

“Q. Was anything done about it?

A. Yes.

Q. What was done?

A. The man came up and looked at it again. That's all."
(Aps. 100.)

The evidence indicated that on the previous trip some 30 days prior to this accident, Mr. Claud Sellman, one of the Stevedores, had noticed that the winch was not functioning properly and he had told the electrician on duty to get it fixed. He stated he would get it fixed the next day. That was on the prior trip. (Aps. 107.) However, this witness testified that he noticed on the night of this accident that this defect had not been attended to. His testimony on this point is as follows:

"A. This night, as I say the reason this dropped—that is the question I am answering, I believe—I consider this a reason and I asked them to get this winch fixed so when it commenced to hit this night, the first time I had the winches, I told Rigney, "You want to watch that port winch because she slips sometimes. You have got to be prepared to stop a few feet before you really intend to because sometimes she will drop several feet before she takes ahold when you are either stopping or starting. When you come to a stop if you run through those notches slowly just about the time before you stop, it will drop several feet like that."

I told Paul that night, "This winch is in the same condition it was before," so when this happened, I figured what must have happened because you can't come back that fast with power on those electric winches. They won't take off that fast." (Aps. 108 and 109.)

Mr. Sellman further testified:

“Q. There wasn’t anything wrong with the winches up until Mr. Dillon’s accident, was there?

A. Yes.

Q. What was it?

A. The same thing. When you are going to land a load, sometimes it will slip two or three feet before it stops.” (Aps. 111.)

“Q. (By Mr. Franklin on cross-examination of Mr. Sellman.) I am asking you how many times the winches slipped after they were stopped on the evening of Mr. Dillon’s injury before his accident occurred?

A. After they were stopped? I didn’t say anything about them slipping after they were stopped.

Q. What did you say was wrong with them?

A. When you are coming to a stop sometimes they would drop before the brake caught.” (Aps. 112.)

The evidence therefore shows that the actual defect was not that the brake slipped after it was stopped, but on the other hand, when coming to a stop. There would be a slipping *before the brake caught* (italics ours). This particular situation had not occurred prior to Mr. Dillon’s injury on the night of May 13th, 1946, and the Stevedores had therefore no knowledge of this particular defect. Mr. Dillon’s injury resulted from the load falling when the winch driver was “coming back” or releasing and lowering away after they had been stopped. That particular defect had not ap-

peared on any prior occasion (Aps. 112). The Stevedores therefore did not have notice of that situation prior to the accident.

The evidence shows that the chief electrician, James A. Steele, never tightened the brakes (Aps. 147). The brake mechanism is a very complicated affair, as is plain from the testimony of the chief electrician, James A. Steele:

“Q. Would you please describe the mechanism known as the automatic brake? As was present on the winches on number one hatch on the Goucher Victory?

A. Well, it was an external contracting brake, consisting of two bands—they might be referred to as shoes—there was a one-inch pin in the bottom and the tops were drawn together by a large spring and the central portion had a shaft that connected to a large solenoid. The spring operated the brake and the solenoid released it, so the brake was held on by spring pressure when the power was disconnected.” (Aps. 153.)

The evidence indicates that there are two brake bands on each winch and that they are affixed at the bottom of the drum on the winch and the solenoid at the top (Aps. 153 and 154). The latter is an electric coil that drives the brakes, opens them and releases them. There is a mechanism for adjusting these brakes which mechanism is situated at each point; adjustment could also be made to the linkage of the solenoid (Aps. 153 and 154). The linkage consists of a pin. There are several pieces to it and it is a rather complicated

mechanism as the testimony of the Chief Electrician James A. Steele discloses:

“Q. Well, will you please describe what the main linkage is? What does it look like?

A. Well, it consists of a pin—now, let me think. There are several pieces to it. I couldn’t describe it in detail to you. There are too many pieces involved.

Q. Well, do the best you can, then.

A. However, it operates on the top or open side of the band to draw the two bands together, and it is a pulling action exerted by the spring. The spring setting against the ear on one band and pulling the ear of the other band up to it.” (Aps. 155 and 156.)

The chief electrician never had tested the braking power of the *brakes* of the No. 1 hatch at any time (Aps. 156).

The foot brake did not amount to much, as is disclosed by the electrician’s testimony:

“Q. Now do you recall whether or not the foot brake was in working order on the number one hatch?

A. Yes, it was in working order. I will say that the foot brakes, though, were very mediocre——

Q. Generally, not much good?

A. Well, they would not stop. They might slow it up a little, but they would not stop it. They were designed that way on purpose, they tell me. What the purpose is, I don’t know but at any rate they were designed so that they wouldn’t hold much, and they don’t.

Q. Well, it is a matter of common notoriety that foot brakes on Victory ships aren't much good?

A. They don't hold very good, no." (Aps. 157.)

The problem of maintaining and tightening the automatic brake required skill and considerable work. It would require the services of two men for about an hour and one-half to do a good job (Aps. 158 and 159).

The testimony of Paul Rigney, the winch driver, and Claud Sellman, the hatch tender, conclusively shows that aside from a very casual tinkering the equipment received no attention after the complaints had been made by the Stevedores.

It is also obvious that due to the very involved mechanical nature of the mechanism, the Stevedores had no means or ability to maintain or repair it, and the evidence discloses they did not have the right to do so (Aps. 96 and 98). The duty and the knowledge required was with the chief electrician and his assistant, who are representatives of the Ship (Aps. 141).

EVIDENCE OF COMPLAINTS MADE BY STEVEDORES ABOUT DEFECTIVE EQUIPMENT

Paul Rigney, Rothschild's winch driver, testified that he complained on two separate occasions, the first time being about 7:30 in the evening (Aps. 98).

The second occasion he made complaint was at approximately twenty minutes to 9 (Aps. 99). As a result of these complaints he stated a man came around and tinkered with the winches (Aps. 98). As a result of the second complaint, a man came up and looked over the winches again (Aps. 100).

The Ship's officers or crew members at no time ever discussed the condition of the winches or the brake to Jacob Petri, who was the foreman for Rothschild-International Stevedoring Co. In fact, no one had advised Mr. Petri of any defective equipment, and he was Rothschild's alter ego. He was their representative direct. There is no evidence in the record that he compromised with negligence by acquiescence, by indifference or by neglect in any degree because the evidence is undisputed that he had no knowledge whatsoever of any dangerous condition.

Mr. Petri testified as the direct representative of the Stevedore that if he had known there was defective equipment, he would not have allowed the men to work (Aps. 197).

The winch driver and the hatch tender made complaints and made reports. The Ship sent men in answer to their complaints and the Stevedores thereafter worked on the reliance that the proper precautions had been taken by those who were responsible therefor.

TESTIMONY OF THE GOVERNMENT WITNESSES

The testimony of the Chief Mate Bauer and Chief Electrician Steele is negative for the most part. Mr. Bauer testified in part as follows:

"Q. Were repairs affected on any part of those winches at any time on May 18th, 1946?

A. Not as far as I know. Of course, the electricians could have worked on them, but there was nothing said to me about it.

Q. Would you have known if they were working on the winches?

A. Yes, I most likely would, if there had been any big repairs on it. Of course, they tested all the winches during the voyage, but I don't remember them doing anything to them." (Aps. 175, 176.)

.

"Q. There is a nut there that you tighten up to tighten the brakes?

A. Yes.

Q. Do you know whether anyone ever tightened that nut while you were aboard the vessel?

A. No.

.

Q. Did you at any time operate the winch yourself, that is, the winch on No. 1 hatch?

A. No; not on No. 1." (Aps. 180 and 181.)

Mr. Steele was off of the ship on the evening of the accident as is disclosed by the testimony of the government witness Frank Palmer:

“Interrogatory No. 11: State what work was being carried on upon the vessel on Monday evening, May 13th, 1946, and by whom.

A. Unloading cargo by stevedores.

Interrogatory No. 12: Where was Mr. Steele that evening?

A. He was off of the ship and I do not know where he was at.” (Aps. 138.)

The evidence of Night Mate Ness does not indicate that he had any occasion to examine the winches. He merely stated as far as he could see they were operating all right. His testimony is that he did not hear any complaints. He is vague as to who gave him the information as to Dillon's injury. He supposed it was the Stevedore foreman. He was also vague as to other matters as disclosed in the following testimony:

“Q. At the time you received that information, what, if anything, was said as to whether the accident was caused by any defect in No. 1 winches?

A. No, I don't think there was any.” (Aps. 123.)

The testimony of government witnesses Bauer, Steele and Palmer was all negative and was by deposition.

THE DISTRICT COURT'S FINDINGS OF FACT AS BEARING UPON THE ACCIDENT

V

That on or about the 13th day of May, 1946, at about the hour of 9:30 p.m., the Libelant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 hold and was in the act of guiding a strong-back into the slot provided as a resting place for said strong-back on the port coaming of said deck, and that while using due care and caution on Libelant's part, the said strong-back suddenly and without warning fell and caught Libelant's right hand injuring it as hereinafter more fully set out.

VI

"That the said injuries to Libelant were proximately caused by the unseaworthiness of the said ship, and by the passive negligence of the Rothschild-International Stevedoring Co., in that the winches at the hatch where the Libelant was working and in operation in connection with the job being done had defective and insufficient equipment, namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of said strong-back and the resulting crushing of the little finger on Libelant's right hand and the finger next to that little finger, and also tendons of the said fingers and the flesh and tissues of the said fingers.

VII

“That the winch brakes in question had been in that unseaworthy insufficient condition for some time, long enough for the Respondent, United States of America, to have discovered it and had time to have remedied it and repaired the said defect, and for a time long enough for the Third Party Respondent, Rothschild-International Stevedoring Co. to have, by reasonable inspection, ascertained and given attention to such unseaworthy and insufficient condition.

VIII

“That the Respondent, United States of America, is liable for the unseaworthiness of the ship caused by such unseaworthy and insufficient equipment in and about the winches and winch brakes; and that the Third Party Respondent, Rothschild-International Stevedoring Co. is guilty of passive negligence in that it failed to exercise due and ordinary care in furnishing the Libelant and those persons working with him a sufficient instrumentality reasonably safe and suitable for doing the work in which Libelant and other employees of the Rothschild-International Stevedoring Co., were engaged at the time the accident occurred; and that such negligence on the part of the Rothschild-International Stevedoring Co. was a proximate cause of the accident and resultant personal injuries sustained by Libelant.”

EFFECT OF APPEAL FROM THE DECREE OF AN ADMIRALTY TRIAL JUDGE

In an appeal from a decree entered by the District Court sitting in admiralty the result is a trial in the Appellate Court de novo and the entire case and record therein is opened for review to the same extent as if both of the parties had appealed, upon the theory that an appeal vacates the decree of the Trial Court and that the entire cause is heard de novo in the Appellate Court.

This rule was announced in a recent decision of the Supreme Court of the United States in the case of "*The John Twohy*," 255 U. S. 77, 79; 41 S. Ct. 251; 65 L. Ed. 511.

See also:

Standard Oil Co. v. So. Pac. Co., 268 U. S. 146, 155;
45 S. Ct. 465; 69 L. Ed. 890.

An appeal in Admiralty vacates the decree entered and removes the cause to the Appellate Court for a trial de novo.

"*The Lidia*" (CCA2) 1 F(2) 18.

Olsen v. Alaska Packers Ass'n. (CCA9) 114 F(2)
364.

"*The Townsend*" (CCA2) 29 F(2) 491.

CONCLUSIVENESS OF FINDINGS OF THE TRIAL COURT

Conclusions to be drawn from the evidence in the Admiralty case are primarily for the trial judge where the trial judge saw the witnesses, heard their testimony, observed their demeanor under oath and had an opportunity of passing upon their credibility and accuracy.

With these conclusions the Appellate Court will not interfere unless the record discloses some plain error of fact or unless there is a misapplication of some rule of law.

See:

"The Bergen" (CCA9) 64 F(2) 877.

Wandtke v. Anderson, et al (CCA9) 74 F(2) 381.

"The Andrea F. Luckenbach" (CCA9) 78 F(2) 827.

"The Redwood" (CCA9) 81 F(2) 680.

"The Golden Star" (CCA9) 82 F(2) 687.

"The Heranger" (CCA9) 101 F(2) 953.

"The Catalina" (CCA9) 95 F(2) 283.

In cases where questions of fact must be resolved from sharply conflicting evidence, the decision of the trial judge who had the opportunity of observing the witnesses under oath, judging of their appearance, sincerity and general demeanor will not be reversed unless it clearly appears that

the decision is against the evidence. This rule has been applied in the following Admiralty cases:

Siciliano v. Calif. Sea Products Co. (CCA9) 44 F(2) 784.

"The Catalina" (CCA9) 95 F(2) 283.

"The Mazatlan" (CCA9) 287 F 873.

"The Beaver" (CCA9) 253 F 312.

Sorenson v. Alaska S. S. Co. (CCA9) 247 F(2) 294.

"The Hardy" (CCA9) 229 F 985.

The Appellate Court in Admiralty can not determine the credibility of witnesses heard in the Trial Court, despite its broad appellate powers. This rule was announced in

Crowley Launch & Tugboat Co. v. Wilmington Transportation Co. (CCA9) 117 F(2) 651.

ARGUMENT

I

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF THE OPERATOR OF THE SHIP IN ALLOWING A COMPLICATED AND INTRICATE MECHANISM SUCH AS THE AUTOMATIC BRAKING DEVICE ON THE WINCH TO BECOME AND REMAIN DANGEROUSLY DEFECTIVE, EVEN AFTER RECEIVING COMPLAINTS BY THE STEVEDORES.

The Stevedores complained on several occasions about the condition of the winches. This mechanism is one which could not be repaired by the Stevedores. The braking device on these winches is a very intricate affair, as is evidenced by the description given thereof by Assistant Electrician Palmer which has been quoted hereinabove. Certainly these Stevedores would not have the knowledge, the ability, nor would they even have the right to interfere with or attend to repairing this complicated machinery.

Having made claims and having witnessed that some representative of the ship had responded, the Stevedores had a right to rely on the fact that the Ship and its servants had performed their duty and corrected the defect.

If the defect was one which could not be corrected, naturally the Stevedores would assume that they would be so advised, or at least their foreman, Mr. Petri, would be so advised.

Mr. Rigney, the winch driver, and Mr. Sellman, the hatch tender, testified that complaints had been made. Mr. Rigney stated that he himself had registered a complaint on two different occasions on that very evening. The last complaint was about 20 minutes to 9 or 50 minutes before this accident happened.

On each of these occasions, Mr. Rigney, the winch driver, testified that someone from the Ship responded to his complaint. It was not Mr. Rigney's duty or capacity to investi-

gate or to determine what corrective measures had been taken. The evidence is undisputed that that duty devolved entirely upon the Ship and its employees.

The inference is, and it is one that the Trial Court could reasonably have drawn, having observed the witnesses and heard them testify and having opportunity to test their sincerity, that an examination having been made and the necessary work having been performed on the machinery, the winch driver was told to go ahead with his work. Certainly that inference can be drawn from substantial evidence from witnesses who were under oath and who testified orally before a trial judge.

The hatch tender, Mr. Sellman, testified that some 30 days before this accident, on a prior trip, he had made complaint to the Ship about the winch and asked them to have it repaired and that they had promised that they would do so.

Mr. Sellman further testified that it was his experience that on these Army ships it did very little good to make complaint, that the Ship evidently ignored the complaints of the Stevedores and through their studied and persistent indifference, the Stevedores were forced to do the best they could under the hazardous circumstances, deliberately brought about by the indifference and neglect of the Ship, its officers and employees.

Mr. Sellman explained very clearly the situation with which the Stevedores were faced in working on the Army

ships, to-wit: He stated it did very little good to make complaint and that if the Stevedores quit work every time they were obliged to work with defective equipment, that they would be going home pretty early pretty often (Aps. 113).

In other words, the Stevedores were working with equipment which they had no capacity to repair or maintain. The automatic braking device on the winches has been described by the chief electrician and it is very obvious that it is a contrivance that required a peculiar knowledge and skill to maintain and repair.

To have that situation in itself places this case in a different category than some of the cases which Appellants have referred to as authorities for a reversal.

Furthermore, the Stevedores did all that they could be expected to do under the circumstances. They registered their objection to working with this complicated mechanism on the grounds that it was defective and not performing satisfactorily.

Credible evidence which the Court no doubt based his findings upon was to the effect that at 7:30 p.m. on that evening and again at 8:40 p.m. objections were made by the Stevedores, particularly by the winch driver, Paul Rigney. There is credible evidence which the Court was justified in accepting to the effect that the Ship's employees responded to these calls and did some work on the equipment.

From the above facts, it is only logical that the Stevedores would have a right to rely on the Ship's agents, their work, and their good faith in maintaining the equipment. The Stevedores would then have a right to go ahead and work on, relying on this assumption.

It is very important to remember that the Ship had the "know-how." They had the ability. They had the authority. They had the men to do this work. The Ship had the responsibility after being warned and requested, to perform the work requested in good faith and with care.

This they did not do and their indifferent attitude and their negligent omission of their duty was the activating, proximate, moving cause of this accident.

The testimony of Night Mate Ness and Assistant Electrician Palmer on duty on the night in question is at the best merely negative. Chief Electrician James A. Steele was not even aboard ship on the night of the accident, so of course he can lend no light whatsoever to the situation.

It is important to consider that every word with reference to the actual condition of the braking device on the winch at No. 1 hatch came from oral testimony from witnesses who were sworn and testified in open court and not from depositions.

Therefore, the findings of the trial judge who had these witnesses under his direct surveillance and observation are

entitled to extremely careful consideration and bear great weight.

The evidence fails to indicate that the Ship's personnel responsible for the maintenance of the winches made any check-up on these winches at any time prior to the beginning of work on the night in question. The evidence fails to show that the Ship took any steps to correct the trouble which existed one month before and of which they were advised by Mr. Sellman. These electricians who represent the Ship are skilled artisans. By checking the brake they can tell whether it will perform properly or how long it will function well. The knowledge is within their capacity and not within the capacity of the Stevedores. There is not a word of evidence in the record that the Stevedores have any knowledge or information with reference to the repair or maintenance of the device in question.

II

THE STEVEDORES DID NOT HAVE ANY PRIOR ACTUAL KNOWLEDGE ON THE NIGHT IN QUESTION OF THE PARTICULAR MECHANICAL DEFECT WHICH BROUGHT ABOUT THIS ACCIDENT.

Counsel for the Appellant while cross-examining the hatch tender, Claud Sellman, asked the following questions:

"Q. There wasn't anything wrong with the winches up until Mr. Dillon's accident, was there?

A. Yes.

Q. What was it?

A. The same thing, when you are going to land a load, sometimes it will slip two or three feet before it stops.

Q. How many times did that occur before Mr. Dillon's injury?

A. Maybe half a dozen times, maybe not.

Q. Did it, half a dozen times?

A. When I was over the hatch, I always make a practice to give him the signal to stop quite a ways up.

Q. I am asking you how many times the winches slipped after they were stopped on the evening of Mr. Dillon's injury before his accident occurred?

A. After they were stopped? I didn't say anything about them slipping after they were stopped.

Q. What did you say was wrong with them?

A. When you are coming to a stop, sometimes they would drop before the brake caught." (Aps. 111 and 112).

It is extremely important in evaluating the evidence in this case to note that the defect herein described by the Hatch Tender Sellman, was not the defect that brought about the injury to the Libellant. We wish to stress and make clear the point that the defect which Mr. Sellman described is not that the winches or the brake slipped *after they were stopped* (italics ours). What Mr. Sellman made clear was this: "That when you are trying to come to a stop, sometimes they would drop before the brake caught."

That was the condition they had been confronted with and which they had complained about.

This, however, was not what caused the accident. It was a mechanical defect entirely different and one of which they had no prior knowledge, according to the testimony of Mr. Sellman which the Court could believe. The mechanical defect which brought about the accident to the Libelant was a dropping or slipping *after* the brake was released and the winch driver was "coming back" or lowering the load.

Now, it is extremely imperative that this distinction be noted. This situation is not the condition described by Mr. Sellman. Mr. Sellman simply stated that they had been slipping "when you were coming to a stop," before the brake caught. He didn't say anything about them slipping after they were stopped.

But it is this latter which happened and this is the defect which brought about the accident and the Stevedores certainly had no knowledge of that situation. These distinctions all go to prove and demonstrate conclusively the intricacy of this mechanism and the imperativeness of greater care and more methodical scrutiny of the equipment on the part of the Ship, which they failed to exercise.

Responsibility accompanies Knowledge and Authority. The Ship had Knowledge and Authority. They did not use it. The Stevedore had neither. He did the best with the service

he was given, which it must be conceded was most indifferent and negligent.

There is no question but what the United States as the owner owed a non-delegable duty to furnish Dillon, the Stevedore, with a seaworthy ship and a safe place in which to work. This is acknowledged by Appellants in their brief.

See:

Seas Shipping v. Sieracki (1946) 328 U. S. 85.

This duty the Ship flagrantly breached under credible evidence which the trial judge could and did accept and upon which he based the findings that the Ship was unseaworthy and that injuries were brought about because of unseaworthiness of the Ship which condition had existed for a sufficient time for the United States of America, operator of the Ship to have discovered it and to have had time to remedy it and to have repaired said defect.

The court further found that the negligence of the Respondent Stevedore was merely passive.

The court further found and the finding was based on credible oral testimony by witnesses who were personally in court, that the Ship is liable for the unseaworthy and inefficient equipment in and about the winches and the winch brakes.

III

ANSWER TO THE ARGUMENT OF THE APPELLANT

Heretofore in our main argument we have answered part I of the Appellant's argument with reference to proximate cause and we will not repeat the same at this time.

The Appellants admit under Section II of their argument that the United States as a ship owner has an undelegable duty to furnish the Stevedore with a seaworthy ship and a safe place in which to work. This duty they can not avoid, neither can they disclaim this obligation and delegate it to someone else and thereby relieve themselves of responsibility. It is the Respondent's position that this duty was violated *knowingly*.

In answer to part III of the Appellant's argument with reference to the Respondent's contractual duty, suffice to say that under the evidence, which the Trial Court could accept, this Respondent was performing its contract to stevedore the vessel properly. There was nothing improper in the manner in which it was performing the work. This accident did not result either proximately or remotely because of any lack of professional skill on the part of the Stevedore.

THIS ACCIDENT WAS PROXIMATELY CAUSED BY THE HEEDLESS AND NEGLIGENT FAILURE OF THE APPELLANT TO MAINTAIN THEIR GEAR IN A

**SEAWORTHY CONDITION, GEAR WHICH WAS A
HIGHLY INTRICATE MECHANISM, THE DEFECTS IN
WHICH COULD NOT BE CORRECTED BY THE
STEVEDORE.**

The Appellants cite certain cases illustrating the rule with reference to the duty of the Stevedore to inspect the Ship's appliances with reference to their safety.

These cases of course discuss and deal with situations not at all apropos to the situation here. The cases cited refer to unsafe mode of access to the ship by Jacob's ladder which was defective. Now, it is obvious without discussion that a defective Jacob's ladder comes within the category of a simple tool or simple appliance and if it is defectively or improperly fastened, that is something which can be readily observed by those about to use it. It is not a complicated gear which requires a skilled person to properly secure. There is no similarity between the type of gear referred to in those cases cited and the case at bar. Therefore, of course, it follows logically that the care required bears a direct relation to the obscurity and intricateness of the mechanism involved. The Stevedore could not exercise care with reference to a matter which was intricate, obscure and unknown to him.

Whereas, an ordinary "land lubber" who had never been on a ship could readily observe whether or not a Jacob's

ladder was properly secured to the side of the ship before he used the same. The cases are not in point.

We have already discussed Section IV of the Appellants' argument. It touches upon the question of proximate cause and we feel that repetition would add nothing to this discussion.

IV

THE ARROW CASE IS NOT IN POINT

The Appellant very cursorily refers to and discusses the Arrow case.

We feel this case should be carefully discussed and the factual background thereof fully referred to because the case when discussed in the light of its own particular facts is not at all in point.

In that case the government appealed from a decree in Admiralty denying a recovery from Arrow, who were impleaded by the government, in a proceeding brought against them by one Percy Williams, a stevedore employee of Arrow.

The government sued Arrow on their contract to indemnify the Government against loss suffered by them from Arrow's performance of its contract to unload cargo. In that case Williams' injury arose from the negligent use of a defective hatch cover which fell on him, so at the outset we see that the defect was in gear of a very different nature

than that in the case at bar and it will be observed that the defect was one which could plainly be seen by everyone concerned, *and it could have been remedied by the Stevedore*. The Government admitted liability to the Stevedore because of its continuing duty to him. The Government claimed that the conscious use of the Stevedore of the defective hatch cover was a proximate cause of the accident and this action was brought by the Government against the Stevedore for recovery of the damages paid by the Government because of the injuries sustained by Williams.

In that case the evidence showed that Williams was hurt some time after 7 a.m. on May 28, 1945 when the cover of the No. 4 port hatch on the lower deck fell upon him. The Appellate Court agreed with the District Court's findings that both dogs were defective and the pins were absent and the hatch cover could not be held erect and that it fell because it was insecurely held by defective dogs.

The Appellate Court however stated that the District Court was in error when it found that *none of the defects* in the dogs were known to Arrow and that the District Court was in error in holding that Arrow's conduct was not a proximate cause of the accident.

Arrow's stevedore supervisor, Mr. Bowers, testified that on the night before he was supervising the night shift's unloading of the starboard and port No. 4 hatch.

The port hatch was raised and secured by the Stevedores at 2 a.m. on the morning of the accident. The defect in the dogs was then discovered and work was discontinued at that hatch. The supervisor said he knew the condition of the hatch and didn't consider it safe. One pin was bent and they couldn't get the other pin in. There was no pin in the aft dog.

With the port hatch in this dangerous shape, the Stevedores worked the safe starboard hatch until 6 a.m. when their shift ended. The morning shift began at 7 a.m. and Bowers testified he did not warn anyone on the morning shift of the dangerous condition of the hatch. At 7 a.m. Larsen, Arrow's boss of No. 4 hatch, looked down from the top deck and stated all seemed safe to him.

The foreman and six men were sent to the port hatch to work. The hatch cover fell and Williams was hurt.

Bowers testified that on the afternoon before the accident he asked the lieutenant of the ship to rig a boom and lift the hatch on the port side.

The officer said he would have the cover properly rigged some time during the day. That is, some time during the day shift.

It is obvious that these facts illustrate a decidedly different situation and an accompanying responsibility of the supervisor of the Stevedores not present in the case at bar.

The Appellate Court could rightly observe that it was apparent that Arrow's supervisor knew the Ship would do nothing about the cover of the port hatch until some time during the day shift.

In other words Bowers, the supervisor for the stevedoring company, was fully aware of a very apparent and obvious danger. He himself testified that during the afternoon he requested the lieutenant of the Ship to remedy this situation.

The officer of the Ship, however, definitely and immediately put the Stevedore's supervisor on notice that they wouldn't or couldn't fix it until some time during the day shift.

With that understanding the Stevedore's supervisor went ahead well knowing that this dangerous situation was threatening the safety and lives of the men, fully realizing that the morning shift was coming on duty at 7 a.m. There was no testimony that Bowers advised the morning shift or their foreman about this situation.

Furthermore, the boss of the morning gang testified that he looked down into the hatch and all seemed safe to him. In other words, Bowers was not only negligent in failing to report the condition to the boss of the morning shift, but the latter himself after looking and inspecting the situation, thought it looked alright and safe enough to proceed. It was a situation which was obvious and open to view. One of the supervisors of the Stevedore had been definitely told by the

Ship that it would not be remedied until the day shift. Yet he never communicated this information to anyone. The Ship had definitely made a promise to take care of this defect on the day shift. Therefore, they had no more obligation than to do what they had promised.

There are no facts similar to this situation in the case at bar. In other words, in the Arrow case, the Ship and the Stevedore made a new agreement, to-wit: The Ship acknowledged that the defective condition was there, but promised to take care of it during the day shift. There is nothing akin to this situation in the case at bar.

Another distinguishing feature which conclusively destroys the Arrow case as an authority in the case at bar is the fact that under the uncontradicted testimony, the defective condition of the dogs on the port hatch could have been securely held erect by a clamp and turnbuckle attached to both starboard and port hatch doors.

The testimony showed that such turnbuckle and gear was right there by the hatch, available for that purpose.

The testimony showed that the door was safely secured by clamp and turnbuckle after the accident.

In other words, this was a simple situation which could have been handled by the Stevedores themselves. It could have been remedied by them. It was open and obvious and there to see. Yet with knowledge of the situation and the

dangers therein and with knowledge of *how* to remedy the situation, the Stevedore's foreman ordered his men to go forward with the work.

In the case at bar, when the defects in the winch brakes were detected, complaint was made. The Ship responded and did something to the winch. The Stevedore had a right to assume that they were fixed.

In the case at bar the evidence does not show that any agreement was made with the Ship to work with dangerous gear until some later time when it would be fixed, *as in the Arrow Case*.

The evidence does not show in the case at bar that the defect was one which could have been readily remedied, *as in the Arrow case*.

The evidence in the case at bar does not indicate that Mr. Petri, the supervisor or walking boss of the Stevedore, had any knowledge whatsoever of any dangerous condition and that so knowing failed to communicate it to his men, *as in the Arrow case*.

The trial judge quickly and accurately distinguished the Arrow case from the case at bar when the argument was had at the close of the evidence. The distinctions seem numerous and clearly render the Arrow case uncontrolling as an authority herein.

Under Section VI of their argument, the Appellants discuss their right to indemnity. They cite the case of *Rich v. U. S.* (CCA2) 177 F(2) 688. This case of course is not apt on the facts. It involves the alleged negligence of the employee in fastening a ladder. Again it is a situation where the gear is simple. The danger if any is open and apparent. We have discussed these distinctions quite fully hereinabove and we do not wish to repeat. The Appellant argues that the Stevedore had the last clear chance to avoid the injury. The answer to that is very simple, the last clear chance is in the possession of the one who has the knowledge, the control, the authority, and the ability to correct the dangerous situation which caused the injury, *that was the Ship*.

The cases cited by the Appellant in support of this rule on pages 19 and 20 are for the most part old cases and deal with facts entirely dissimilar from those at bar and with rules altogether different. They are not cases in Admiralty jurisdiction and they are not authority for the rule for which the Appellant intends it. These cases deal with elevators, streetcars, automobile accidents, train crossing accidents and situations which throw no light and give no assistance whatsoever to this Court in considering the case at bar.

CONCLUSION

It is submitted that the findings of the trial judge and the conclusions he drew therefrom were based on credible and substantial evidence.

All witnesses who testified as to the *actual condition* of the winch and the brakes testified orally under oath in the presence of the judge. He had the opportunity to observe them, to weigh their credibility, to study their demeanor and their sincerity. Under these circumstances and under the law heretofore stated, his Findings and his Judgment are entitled to great weight and we submit that the Judgment of the Trial Court should be affirmed.

Respectfully submitted,

W. E. DU PUIS

Proctor for Appellant

No. 12406

United States
Court of Appeals
For the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue,
Appellant,

VS.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION, a Cooperative Agricultural Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

FILED
FEB 24 1950

PAUL P. O'DRISCOLL

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	24
Appeal:	
Appellant's Statement of Points on Which He Intends to Rely on.....	52
Clerk's Certificate to Record on.....	49
Designation of Contents of Record on....	43
Notice of.....	41
Order Extending Time to File.....	42
Appellant's Designation of Record for Printing	54
Appellant's Statement of Points on Which He Intends to Rely on Appeal.....	52
Attorneys of Record.....	1
Certificate of Probable Cause.....	40
Clerk's Certificate to Record on Appeal.....	49
Complaint	2
Exhibit A—Claim	7
B—Claim	10
C—Claim	13
D—Claim	16
E—Claim	19

INDEX	PAGE
Designation of Contents of Record on Appeal.	43
Exhibit, Plaintiff's:	
No. 1—Letter Dated June 24, 1948.....	44
Findings of Fact and Conclusions of Law....	34
Judgment	39
Motion to Dismiss.....	22
Notice of Appeal.....	41
Order Dismissing United States of America...	23
Order Extending Time to File Appeal.....	42
Proceedings	26

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In the District Court of the United States, Western
District of Washington, Southern Division

No. 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

UNITED STATES OF AMERICA, also CLARK
SQUIRE, COLLECTOR INTERNAL
REVENUE,

Defendants.

COMPLAINT

Comes now the plaintiff, pursuant to section 24, sub-section 20 of the Judicial Code, as amended, (28 U.S.C.A. sec. 40, sub-section 20, 24 Stat. 505), and for a cause of action complains and alleges as follows:

I.

That the Sumner Rhubarb Growers Association is a co-operative agricultural corporation, organized under the laws of the State of Washington, chapter 19 of Session Laws of 1913.

II.

That Clark Squire is now and was at all times hereinafter mentioned, the duly appointed, qualified and acting Collector of Internal Revenue for the State of Washington and Territory of Alaska.

III.

That the purposes for which the said association is formed are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business; that the primary purpose for the organization of the association is to handle the agricultural and horticultural products of its members upon a co-operative basis, and to handle all of such products of members who shall sign the standard marketing agreement of the association upon the basis of actual cost to the association, and an amount apportioned over the entire operations of any one season.

That the plaintiff has been engaged during the period for which the claims referred to hereinafter will cover, in Sumner, Washington, which is located within the Western district of Washington, southern division.

That during said periods the plaintiff has been engaged in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley; that all of the rhubarb handled by the plaintiff has been grown on the farm of members of the association, and practically all of the rhubarb

sold is shipped from packing on the farm where it is grown; that the rest of the rhubarb which the plaintiff has handled during the period in question, is packed at the plaintiff's warehouse in Sumner, Washington; that all of the rhubarb, after being packed, is shipped from the plaintiff's rented warehouse.

IV.

That the operation of the Sumner Rhubard Growers' Association, during the period for which said claims have been filed, were seasonal, extending from January to the middle of May of each year.

V.

That during the year 1931 the plaintiff established a status of exemption with the United States Internal Revenue Department under section 103 (12) of the Revenue Act of 1928, and has maintained its tax exempt status for the years during the period from October 1, 1942, to June 30, 1946, for which the United States Collector of Internal Revenue has demanded that the plaintiff pay social security tax.

That for the period from October 1, 1942, to December 31, 1942, the plaintiff paid \$3.38, which payment was made January 9, 1943.

That the plaintiff paid social security tax for the period from January 1, 1943, to December 31, 1943, the sum of \$130.19, said payment being made quarterly from April 6, 1943.

That the plaintiff paid social security tax for the period from January 1, 1944, in the sum of \$137.27,

said payment being quarterly from April 11, 1944.

That the plaintiff paid social security tax for the period of January 1, 1945, to March 31, 1945, the sum of \$70.11, said payment being made April 13, 1945.

That the plaintiff paid social security tax for the period from January 1, 1946, to June 30, 1946, payments of the same in the amount of \$25.08 being made April 24th and July 30th, 1946.

That there has been duly filed with the defendant, Nov. 18, 1946, a claim for refund for each of the periods set forth above, copies of said claims being marked Exhibits "A," "B," "C," "D," "E," and made a part hereof by this reference.

That more than six months have expired since the filing of the said claims and each of them, and no refund has been made by the defendant.

That by letter of June 24th, written by Victor H. Self, Deputy United States Commissioner, plaintiff was advised that claim #499930, being exhibit "E" herein, was disallowed, and that remaining claims were being adjusted in accordance with the ruling.

That in accordance with the Commissioner's ruling, the defendant denied refund under plaintiff's claims for the following employees: Manager, assistant manager, and all stenographers and office employees.

That as a result of said ruling the plaintiff will still have due and owing him the following amounts, as set forth hereinafter: for the year 1943 the sum of \$22.03; for 1944, the sum of \$27.00; for 1945 the

sum of \$15.03; for 1946 the sum of \$25.08; that the total due as a refund is the sum of \$89.14.

Wherefore, the plaintiff prays for judgment of this court in the sum of \$89.14, with interest at six percent. per annum.

And for such other relief as to the court may seem just and equitable.

/s/ JOHN W. FISHBURNE,
Attorney for Plaintiff.

United States of America,
County of Pierce,
State of Washington—ss.

E. S. Watts, being first duly sworn, on his oath deposes and says:

That he is the attorney-in-fact for the plaintiff, Sumner Rhubarb Growers' Association, in the above entitled cause; that he has read the foregoing complaint, knows the contents thereof, and says the same is true.

/s/ E. S. WATTS,
Attorney-in-fact for Sumner Rhubarb Growers'
Association.

Subscribed and sworn to before me this 9 day of August, 1948.

[Seal] /s/ T. W. KENNARD,
Notary Public in and for the State of Washington,
residing at Tacoma.

EXHIBIT A

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association,

Business address P. O. Box 86, Sumner, Wash-
ington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete :

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Oct. 1, 1942, to Dec. 31, 1942
3. Character of assessment or tax Social Security
4. Amount of assessment, \$6.76; dates of payment
Jan. 9, 1943
5. Date stamps were purchased from the Government
6. Amount to be refunded \$3.38
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally
filed expires, under section 3313 of (Revenue Act
or Internal Revenue Code) on January 9, 1947

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Social Security Act, as Amended, Sec. 209(b) (10) (B) and Sec. 209(b) (1).
7. Only the Associations' share is claimed above. The employees will file their own claims.

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

/s/ MARGARET BOWEN

Notary Public

EXHIBIT B

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address P. O. Box 86, Sumner, Wash-
ington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1943, to Dec. 31, 1943
3. Character of assessment or tax Social Security
4. Amount of assessment, \$260.38; dates of payment
Quarterly from April 6, 1943
5. Date stamps were purchased from the Government
6. Amount to be refunded \$130.19
7. Amount to be abated (not applicable to income, gift, or estate taxes)\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 6, 1947 or no earlier

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

. EXHIBIT C

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1944, to Dec. 31, 1944
3. Character of assessment or tax Social Security
4. Amount of assessment, \$274.54; dates of payment
Quarterly from April 11, 1944
5. Date stamps were purchased from the Government
6. Amount to be refunded \$137.27
7. Amount to be abated (not applicable to income, gift, or estate taxes)\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 11, 1948 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

EXHIBIT D

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1945, to Mar. 31, 1945
3. Character of assessment or tax Social Security
4. Amount of assessment, \$140.22; dates of payment April 13, 1945
5. Date stamps were purchased from the Government
6. Amount to be refunded \$70.11
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 13, 1949 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Only the part paid by the Association is claimed herewith. The employees will file their own claims.
7. Social Security Act, as Amended, Sec. 209(b) (1) and Sec. 209 (b) (10) (B).

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

EXHIBIT E

Form 843

TREASURY DEPARTMENT

Internal Revenue Service

Claim

To Be Filed with the Collector where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on
the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Ex-
cessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to
to estate, gift, or income taxes).

State of Washington

County of Pierce—ss:

Name of taxpayer or purchaser of stamps Sum-
ner Rhubarb Growers' Association

Business address Box 86, Sumner, Washington

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete :

1. District in which return (if any) was filed
Washington and Alaska
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
Jan. 1, 1946, to June 30, 1946
3. Character of assessment or tax.....
4. Amount of assessment, \$50.16; dates of payment
April 24 and July 30, 1946
5. Date stamps were purchased from the Government
6. Amount to be refunded \$25.08
7. Amount to be abated (not applicable to income, gift, or estate taxes).....\$.....
8. The time within which this claim may be legally filed expires, under section 3313 of Revenue Act of 1939 on April 24, 1950 or no earlier.

The deponent verily believes that this claim should be allowed for the following reasons:

1. The term employment has never included agricultural labor.
2. This is a cooperative farming organization for marketing purposes, and is exempt from income tax under Sec. 101 (1) of the Internal Revenue Code.

3. In addition, the Federal Law, beginning Jan. 1, 1940, specifically exempts all service in the employ of such an organization.
4. This organization received erroneous advice on the subject until about a year ago.
5. The collector's office has never advised the organization to refrain from filing returns and paying such erroneous tax.
6. Social Security Act, As Amended, Sec. 209(b) (10) (B) and Sec. 209(b)(1).
7. Only the Associations' share is claimed above. The employees will file their own claims.

/s/ WM. McCLANE

Secretary-Treasurer

Subscribed and sworn to before me this 18 day
day of November, 1946

.....

Notary Public

[Endorsed]: Filed August 13, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants by their attorneys, the undersigned, and move that the complaint of the plaintiff be dismissed on the ground and for the reason that there is a misjoinder of parties defendant.

See Stark v. United States,
14 F. (2d) 616. (headnote 2).

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ HARRY SAGER,
Assistant U.S. Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the
Chief Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed December 16, 1948.

[Title of District Court and Cause.]

ORDER DISMISSING UNITED STATES
OF AMERICA

The above matter coming on regularly before the Court this day upon the defendants' Motion to Dismiss, the hearing having been noted by plaintiff's counsel. And the plaintiff not appearing by counsel or otherwise and the defendants appearing by Harry Sager, Assistant United States Attorney, and the Court having fully considered the matter, it is

Ordered that the United States of America be and it is hereby dismissed as a defendant in the above-entitled cause and the plaintiff's complaint is dismissed as to the United States of America.

It Is Further Ordered that the defendant Clark Squire, Collector of Internal Revenue, shall have thirty days from this date in which to file his Answer to the plaintiff's complaint.

Done In Open Court this 17th day of January, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Presented by:

/s/ HARRY SAGER,
Asst. U.S. Attorney.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant by J. Charles Dennis, United States Attorney for the Western District of Washington, answering the complaint, generally denies all the averments thereof except such designated averments as he expressly admits.

The defendant further answers as follows, the numbers of the following paragraphs corresponding respectively to the numbers of the paragraphs of the complaint.

I.

The defendant denies these averments.

II.

The defendant admits these averments.

III.

The defendant is without knowledge or information sufficient to form a belief as to the truth of these averments.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of these averments.

V.

The defendant denies these averments except he admits the averments with respect to (a) exemption under Section 103(12) of the Revenue Act of 1928, granted the plaintiff in the year 1931; (b) tax pay-

ments in certain amounts for certain periods; and that claims for refund were filed more than six months prior to the commencement of the action, of which the five lettered Exhibits are true copies, and that there have been no refunds of any taxes referred to therein.

The defendant says that by letter dated July 24, 1948, from Deputy Commissioner of Internal Revenue, plaintiff was advised that its claim numbered 499930, of which Exhibit "E" is a true copy, was disallowed and that the remaining claims were being adjusted in accordance with a ruling contained in a letter from the said Deputy Commissioner of said date to the plaintiff's representatives, which speaks for itself.

The defendant further says that the exemption granted the plaintiff in 1931, referred to above, was revoked, as of January 1, 1939, the effective date of the Internal Revenue Code, and that the plaintiff was so informed by a letter from the Deputy Commissioner dated March 12, 1948.

Wherefore, the defendant prays that judgment be entered for the defendant with costs.

/s/ J. CHARLES DENNIS,
United States Attorney,
Attorney for Defendant.

/s/ HARRY SAGER,
Asst. U.S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed February 18, 1949.

In the District Court of the United States for the
Western District of Washington, Southern
Division

Number 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

PROCEEDINGS

Transcript of Oral Decision given by the Honorable Charles H. Leavy, United States District Judge, in the above-entitled cause in the above-entitled court, on the 16th day of May, 1949, at Tacoma, Washington.

Appearances:

JOHN W. FISHBURNE, ESQ.,

Tacoma, Washington,

Appeared for the Plaintiff;

THOMAS R. WINTER, ESQ.,

Assistant United States Attorney,

Appeared for the Defendant.

Testimony and other evidence having been offered, and arguments having been made by the

respective counsel, the following proceedings occurred:

The Court: I think, Mr. Winter, I am prepared to make a disposition of this.

Mr. Winter: If your Honor holds that they are agricultural—I am wondering—if you hold they are exempt by 101(1), I don't think there is any evidence that they are exempt under that Statute and entitled to exemption.

The Court: We have here the question for determination, as I understand it, whether or not this cooperative agricultural association was properly assessed for Social Security Tax upon two of its employees for a period of three years.

The amount involved is small but the principle, of course, is one that is of great importance, not only to the tax payer but to the Government in many other similar cases and it is for that reason that I was desirous of getting clearly in mind just what the issues are.

This question of what constitutes agricultural labor has been troublesome since it was first written into the Act. Not only do you have the responsibility of its administration but the Courts in their determination have to decide what Congress meant. After the original enactment, it was sought to be clarified by the amendment.

There is no dispute now, however, as to the existing law and no dispute as to the facts in light of the record as here made and the facts clearly establish that here is an "organization" set up under the

provisions of the laws of the State of Washington on a cooperative basis to deal with a single agricultural product, to-wit, rhubarb.

There might be some argument made as to whether rhubarb is a fruit or a vegetable, but it certainly is one or the other. Some people might classify it one way and some another way.

The organizational set up is such that it will handle only the growers' products and not the product of anyone on the outside.

The central collection depot is provided where the grower, under the direction of the officers of the cooperative, packs his product to get certain standards, and then it is hauled in from the farms by employees of the cooperative and then shipped to places where it is sold, and then by the buyer, I assume, distributed to the ultimate consumer.

The organization itself is a small membership in the neighborhood of one hundred growers. It is a seasonal operation continuing for a period of about four months in the year.

Aside from its officers, as provided for by its Articles of Incorporation, it has the employees that I have referred to who do the trucking and the hauling and the loading. And then it has the accounting employees. In this case there are two in number and they are working for a salary during this four month period which is involved in this controversy.

Now, when we turn to the law—and I am not going to cite numerous authorities because I haven't

had an opportunity to run them down and rarely will you find authorities that have identical facts, and none of those are cited—this case, cited in 152 Federal 837, *Birmingham vs. Rucker Breeding Farms*, which is a Court of Appeals case from the Eighth Circuit, more nearly fits our situation than any of the other citations; although it isn't squarely in point because the language is not comprehensive in the statutory definition of agricultural laborer. However, turning to that definition found in U.S.C., Title 26, Section 1426, subsection 8 of subsection 4, we have this language that is quite applicable to the problem now before us, and it reads as follows:

“The term agricultural labor includes all services in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market.”

The government concedes here that everyone who participates in these activities in the time involved is within the exemptions that the Court read excepting the two individuals that I have referred to before, who kept the accounts and wrote the checks and looked after the finances and made the disbursements. It contends that they would not be persons who would be classified as being employed

as incident to the preparation of such fruits and vegetables for market and, therefore, would not be exempt from Social Security Tax.

The Act that I have just read, standing alone, might not be sufficient to cover the situation so we refer to Title 26, Section 101, subdivision 1, and subdivision 12. The contention of the Plaintiff is that these office employees fall under subdivision 1, which is a general definition, and the contention of the Government is that they fall under subdivision 12, and if they do fall under subdivision 12, then the Government should prevail here.

I am unable to determine that Congress could possibly have had in mind a distinction such as is sought to be made between this comprehensive language in subdivision 1, "labor—agricultural or horticultural," and subdivision 12.

There is no question at all in the mind of the Court that the record as here made brings this cooperative within the provisions of subsection 12. But, by being brought within the language of that subsection, I can not assume that they are excluded from the broader language of subsection 1, which classifies the following organizations as exempt from taxation under this chapter, as being those that are labor organizations and agricultural or horticultural organizations.

We have here an agricultural organization; or, if you classify rhubarb as a fruit, it is a horticultural organization.

It is a cooperative.

Its function is not a profit making business.

The processing of this rhubarb, under the cooperative's direction, is done on the farm and hauled to a central point and there distributed.

In order that it can function as a cooperative agricultural or horticultural organization, it must of necessity have someone employed to keep books and records.

I doubt that even in this small operation the bookkeeper and the *account*, or whatever their designations are, or whether the employee was actually handling crates of rhubarb, is important. It seems to this Court an absurdity that everybody identified with this farm marketing organization is exempt except those who kept the records and that they should be subject to tax.

I am convinced that the interpretation placed upon the language of the Act—and had there been any regulation that would seem to be contrary to the language of the Act, with all due respect for the Department, I would not feel warranted in following them—but I am convinced that the Internal Revenue Department did not have the full understanding of the operation of this organization, a cooperative association, or they would never have arrived at the conclusion which they did.

I suggested at the outset here, to counsel, that the letter from the Department introduced in evidence seemed to indicate some feeling on the part of some employee of the Internal Revenue Department that because their demands had not been met and their commands had not been obeyed they arbitrarily proceeded to assess the tax. But the

Court was advised that this assessment dealt with income taxes rather than Social Security Tax.

I appreciate that anyone who attacks anything concerning Federal taxes has the burden of proving their contention. The rule of construction is one of rather strict construction against the taxpayer, but this Court at any rate feels it is splitting hairs when you attempt to make a distinction between those absolutely essential employees who are engaged in the business of marketing for the members of the cooperative and those persons who keep the records.

I shall, therefore, find for the Plaintiff in the amount prayed for in the Complaint, and I will allow the Defendant—the Government—exceptions.

Mr. Winter: Your Honor, I am wondering, is your Honor finding that this corporation was exempt under Section 101(1)?

The Court: Yes.

Mr. Winter: Would you make that finding, your Honor?

The Court: I thought I made it clear. It is exempt under 101(1) and likewise under 101(12); and neither are exclusive of the other.

101(1) is comprehensive enough to cover (12) and it is, therefore, exempt under 101(1).

Mr. Winter: The point I was making is that such an exemption statute is strictly construed and I don't think there is any evidence that they are an association.

The Court: That is what we have been determining all morning.

Mr. Winter: In none of the cases that we have cited has any of those corporations ever been allowed any exemptions under 101(1).

The Court: Well, this will be one case where they will be, so far as this Court has the responsibility of determining. The Appeals Court may take another view, however.

Mr. Winter: I wanted just to point it out, your Honor.

The Court: In order that you may have it clear, I think when you get a transcript of what I have just said you will find that I bring this within the provisions of 101(1); that is, that it is an agricultural or horticultural organization; and then we go to the Social Security Tax that I referred to.

Mr. Fishburne: Which is 1426(4).

The Court: Yes.

(Whereupon, other matters were discussed and at 12:10 o'clock, p.m., May 16, 1949, hearing in this cause was adjourned.)

CERTIFICATE

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come regularly before this court on the 16th day of May, 1949, plaintiff having been represented by John W. Fishburne, and the defendant being represented by Assistant United States Attorney Thomas R. Winter, testimony having been taken and the court having considered said evidence, makes the following findings of fact and conclusions of law:

I.

That the Sumner Rhubarb Growers Association is a co-operative agricultural corporation, organized under the laws of the State of Washington, chapter 19 of Session Laws of 1923.

II.

That Clark Squire is now and was at all times hereinafter mentioned, the duly appointed, qualified and acting Collector of Internal Revenue for the State of Washington and Territory of Alaska.

III.

That the purposes for which the said association is formed are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and

horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business; that the primary purpose for the organization of the association is to handle the agricultural and horticultural products of its members upon a co-operative basis, and to handle all of such products of members who shall sign the standard marketing agreement of the association upon the basis of actual cost to the association, and an amount apportioned over the entire operations of any one season.

That the plaintiff has been engaged during the period for which the claims referred to hereinafter will cover, in Sumner, Washington, which is located within the Western district of Washington, southern division.

That during said periods the plaintiff has been engaged in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley; that all of the rhubarb handled by the plaintiff has been grown on the farms of members of the association, and practically all of the rhubarb sold is shipped from packing on the farm where it is grown; that the rest of the rhubarb which the plaintiff has handled during the period in question, is packed at the plaintiff's warehouse in Sumner, Washington; that all of the rhubarb, after being packed, is shipped from the plaintiff's rented warehouse.

IV.

That the operation of the Sumner Rhubarb Growers' Association, during the period from which said claims have been filed, were seasonal, extending from January to the middle of May of each year.

V.

That during the year 1931 the plaintiff established a status of exemption with the United States Internal Revenue Department under section 103(12) of the Revenue Act of 1928, and has maintained its tax exempt status for the years during the period from October 1, 1942, to June 30, 1946, for which the United States Collector of Internal Revenue has demanded that the plaintiff pay social security tax.

That for the period from October 1, 1942, to December 31, 1942, the plaintiff paid \$3.38, which payment was made January 9, 1943.

That the plaintiff paid social security tax for the period from January 1, 1943, to December 31, 1943, the sum of \$130.19, said payment being made quarterly from April 6, 1943.

That the plaintiff paid social security tax for the period from January 1, 1944, in the sum of \$137.27, said payment being quarterly from April 11, 1944.

That the plaintiff paid social security tax for the period of January 1, 1945, to March 31, 1945, the sum of \$70.11, said payment being made April 13, 1945.

That the plaintiff paid social security tax for

the period from January 1, 1946, to June 30, 1946, payments of the same in the amount of \$25.08 being made April 24th and July 30th, 1946.

That there has been duly filed with the defendant, Nov. 18, 1946, a claim for refund for each of the periods set forth above, copies of said claims being marked Exhibits "A," "B," "C," "D," "E," and made a part hereof by this reference.

That more than six months have expired since the filing of the said claims and each of them, and no refund has been made by the defendant.

That by letter of June 24th, written by Victor H. Self, Deputy United States Commissioner, plaintiff was advised that claim #499930, being exhibit "E" herein, was disallowed, and that remaining claims were being adjusted in accordance with the ruling.

That in accordance with the Commissioner's ruling, the defendant denied a refund under plaintiff's claims for the following employees: Manager, assistant manager, and all stenographers and office employees.

That as a result of said ruling the plaintiff will still have due and owing him the following amounts, as set forth hereinafter: for the year 1943 the sum of \$22.03; for 1944, the sum of \$27.00; for 1945 the sum of \$15.03; for 1946 the sum of \$25.08; that the total due as a refund is the sum of \$89.14.

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

And from the foregoing findings the court concludes as follows:

Conclusions of Law

I.

That the court has jurisdiction over the parties to this action and over the subject matter thereof.

II.

That the plaintiff's claims for refund were duly filed with the Collector of Internal Revenue.

III.

That all of the plaintiff's employees are exempt from United States Social Security tax under title 26 U.S.C.A. sec. 10(1) and 101(12).

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 1157

SUMNER RHUBARB GROWERS'
ASSOCIATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

JUDGMENT

This matter having come regularly before this court on the 16th day of May, 1949, plaintiff having been represented by John W. Fishburne, and the defendant being represented by Assistant United States Attorney Thomas R. Winter, testimony having been taken and the court having made findings of fact and conclusions of law, and being fully advised in the matter, it is hereby

Ordered, Adjudged and Decreed that the plaintiff be and it is hereby awarded a judgment against the defendant in the sum of \$89.14, together with interest and costs.

Done In Open Court this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

I, Charles H. Leavy, Judge of the United States District Court, Western District of Washington, Southern Division, sitting in the above case, and in accordance with title 28 U.S.C. 2006, (28 U.S.C. Sec. 842, as amended) of the Revised Statutes of the United States, as amended, do hereby certify that the acts done by the defendant in the above entitled case as Collector of Internal Revenue, in exacting and collecting the taxes for which judgment was entered in the above entitled case on this date, in the sum of \$89.14, with interest and costs as provided by law, were done under the direction of the Commissioner of Internal Revenue and in his official capacity as such Collector of Internal Revenue, and that the said defendant had probable cause for his acts, notwithstanding the fact that said tax and interest was erroneously collected and judgment has been rendered for refund thereon in this case.

Dated this 29th day of June, 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 29, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Sumner Rhubarb Growers' Association, plaintiff above named, and to John W. Fishburne, Attorney for Plaintiff.

You and Each Of You, will please take notice that the defendant, Clark Squire, United States Collector of Internal Revenue for the State of Washington, appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 29, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

/s/ GUY A. B. DOVELL,
Assistant U.S. Attorney,
Attorneys for Defendant.

Copy of the within Notice of Appeal mailed to J. W. Fishburne, Attorney for Plaintiff, this 25th day of August, 1949.

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDWAYNE,
Deputy.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of defendant, through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals for the Ninth Circuit, to enable the defendant to procure a transcript of the testimony and other evidence offered at the trial, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal be, and it is hereby extended to fifty days from the first date of the Notice of Appeal, to-wit to the 23rd day of November, 1949.

Made and entered at Tacoma, Washington, this 28th day of Sept., 1949.

/s/ CHARLES H. LEAVY,
U.S. District Judge.

Presented by:

/s/ GUY A. B. DOVELL,
Asst. U.S. Attorney.

[Endorsed]: Filed Sept. 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To: The Clerk of the Above Entitled Court:.

Defendant Clark Squire, United States Collector of Internal Revenue for the District of Washington, by and through his attorneys of record, J. Charles Dennis, United States Attorney for the Western District of Washington, Guy A. B. Dovell, Assistant United States Attorney for said district, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, pursuant to Rule 75(a) of Rules of Civil Procedure, as amended, hereby designates the entire and complete record in this case, including a transcript of all proceedings and evidence and all of the original exhibits, to be contained in the record on appeal.

/s/ J. CHARLES DENNIS,
U.S. Attorney.

/s/ GUY A. B. DOVELL,
Assistant U.S. Attorney.

/s/ THOMAS R. WINTER,

Assistant to the Chief Counsel, Bureau of Internal
Revenue.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 16, 1949.

PLAINTIFF EXHIBIT 1

Treasury Deartment

Washington 25

Office of Commissioner of Internal Revenue. Address Reply To Commissioner of Internal Revenue and Refer to EmT:A:AA:5-AES

June 24, 1948.

Mr. E. S. Watts,
c/o Bunker, Tanner and Watts,
Tacoma, Washington

Dear Mr. Watts:

Reference is made to your letter dated June 8, 1948, relative to the claims filed by the Sumner Rhubarb Growers' Association, Post Office Box 86, Sumner, Washington, for refund of employers' tax in the total amount of \$366.03, under the provisions of the Federal Insurance Contributions Act for the period from October 1, 1942 through June 30, 1946.

The bases of the claims are (a) that the amounts thereof represent employers' tax erroneously paid with respect to the remuneration of certain individuals for services which, it is alleged, are excepted from "employment" as "agricultural labor", and (b) that the Association is exempt from income tax under Section 101(1) of the Internal Revenue Code, and, therefore, is not liable for Federal employment taxes.

In Bureau letter dated February 6, 1948, you

were advised that action on the claims was being held in abeyance pending a determination whether the Sumner Rhubarb Growers' Association is exempt under Section 101(1) of the Internal Revenue Code.

You state in your letter that, under date of May 19, 1948, you were advised that, since you had failed to submit the necessary information, the Commissioner had revoked the ruling of exemption issued on September 3, 1941 (1931), wherein the Association was granted exemption under Section 103(12) of the Revenue Act of 1928, and request that this office take formal action with respect to the claims.

Information on file in this office discloses that in Bureau letter addressed to the Association on January 15, 1948, under the symbols IT:P:ER-RBB, it was held that, since the information furnished indicates that the activities of the Association consist primarily of marketing agricultural products for its members, and in view of the provisions of Section 101(12) of the Internal Revenue Code, the Association is not entitled to exemption as an agricultural organization under the provisions of Section 101(1) of the Code. Accordingly, the Association was requested to furnish information for use in determining whether it is being operated in such a manner as to be entitled to exemption from Federal income tax under Section 101(12) of the Code. However, such information was not furnished, and, therefore, in Bureau letter dated March 12, 1948,

under the afore-mentioned symbols, the Association was informed that the exemption granted it under Section 103(12) of the Revenue Act of 1928, in Bureau letter dated September 3, 1931, was revoked, effective January 1, 1939, the effective date of the Internal Revenue Code. Such ruling was affirmed in Bureau letter addressed to the Association on May 19, 1948.

Inasmuch as the Association's request for exemption under Section 101(1) of the Internal Revenue Code has been denied, this office is unable to give favorable consideration to the Association's contention that all the services performed for it are excepted from "employment" for Federal employment tax purposes. In addition, since the information necessary to establish that the Association is exempt under Section 101(12) of the Code has not been furnished, the adjustment of the claims filed by the Association can be based only on the extent to which the services performed by the individuals involved are excepted as "agricultural labor" in accordance with the provisions of Section 1426(h) (4) of the Federal Insurance Contributions Act.

The information on file discloses that the activities of the Association consist of the receiving, handling, packing, and shipping of fresh rhubarb grown only by its members. Mr. F. W. Mattson, the manager of the Association, devotes about fifty per cent of his time to the Association during each five or six month season. About half of the time devoted by Mr. Mattson to the Association is spent

in the field or supervising the grading and packing of the rhubarb and the remaining half is devoted to the administrative functions of the Association. Mr. Amiel Goettsch is primarily the bookkeeper or office manager with about twenty-five per cent or less of his time devoted to unloading or warehouse work. In addition, during the periods involved in the claims, the Association employed a secretary and an office clerk as well as other individuals who performed services in connection with receiving, handling, packing, loading, shipping, and selling of the rhubarb.

In view of the provisions of Section 1426(h)(4) of the Federal Insurance Contributions Act, and on the basis of the information presented, it is held that the services performed after December 31, 1939, by the warehouse labor in the receiving, handling, packing, warehousing, and loading of the rhubarb, together with the direct supervision of such services, constitute "agricultural labor" for Federal employment tax purposes. However, services performed in connection with the repair and maintenance of the plant and its equipment, as well as clerical and sales services, do not constitute "agricultural labor" for such purposes. To the extent that the manager and the office manager engage in the direct performance or in the supervision of services, after December 31, 1939, which of themselves constitute "agricultural labor", they are considered to be engaged in "agricultural labor". Other services performed by such individuals constitute "employment".

Section 1426(c) of the Federal Insurance Contributions Act, in force on and after January 1, 1940, provides that if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him.

The claims filed by the Association are being adjusted in accordance with the foregoing. When action thereon has been completed, the Association will be appropriately notified through the office of the collector of internal revenue for its district.

Very truly yours,

/s/ VICTOR H. SELF,

Deputy Commissioner.

AES:MVR

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON
APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above entitled cause all of the original pleadings and papers on file and of record in said cause, in my office at Tacoma, Washington, as set forth below:

1. Complaint (1)
2. Summons and Marshal's Return of Service (2)
3. Stipulation extending time to answer (3)
4. Order extending time to answer (4)
5. Motion of defendants to Dismiss (5)
6. Notice of Hearing on Motion to Dismiss (6)
7. Order Dismissing United States as party defendant (7)
8. Answer (8)
9. Notice of Assignment for trial (9)
10. Reporter's Transcript of Oral Decision (10)

11. Letter, Winter to Fishburne, re Certificate of Probable Cause (11)
12. Findings of Fact and Conclusions of Law (12)
13. Judgment, for Plaintiff (13)
14. Certificate of Probable Cause (14)
15. Cost Bill, Plaintiff (\$39.60) (15)
16. Notice, defendant, of Appeal (16)
17. Order Extending Time (to 11/23/49) to File Appeal (17)
18. Designation of Contents of Record on Appeal (18)

I do further certify that I am also transmitting herewith the following original exhibits, admitted in evidence in the trial of the above entitled cause, to-wit: Plaintiff's Exhibit No. 1, and that said exhibit and the aforesaid original pleadings and papers constitute the Record on Appeal from the Judgment of the said District Court, filed June 29, 1949, and entered in the civil docket of said cause on said date.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 19th day of November, 1949.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy Clerk.

[Endorsed]: No. 12406 United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue, Appellant, vs. Sumner Rhubarb Growers' Association, a Cooperative Agricultural Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed November 23, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12406

CLARK SQUIRE, Collector of Internal Revenue,
Appellant

vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL

Now comes Clark Squire, Collector of Internal Revenue, appellant in the above entitled case, and states the points on which he intends to rely, as follows:

1. The trial court erred in concluding that the appellee's employees were exempt from the Federal Social Security Tax under Title 26 U.S.C., Section 101 (1) and 101 (12), or either of those sections.

2. The trial court erred in finding that the appellee had maintained a tax exempt status during the tax period from October 1, 1942, to June 30, 1946, involved in the action, or any portion of that period, and that it was entitled to a tax refund.

3. The trial court erred in awarding judgment for the appellee.

4. The trial court erred in holding that the services performed for the appellee did not constitute employment, under 26 U.S.C., Sections 1426 (b) (10) (A) and (B).

5. The trial court erred in failing to rule that the services performed for the appellee constituted employment under 26 U.S.C., Section 1426 (b); and were not exempt under Sections (l) and (h) of that Section.

/s/ THEON L. CAUDLE,
Assistant Attorney General,
Attorney for Appellant.

Receipt of the within Appellant's Statement of Points on which He Intends to Rely on Appeal is acknowledged this day of December, 1949.

.....
JOHN W. FISHBURNE,
Attorney for Appellee.

[Endorsed]: Filed December 23, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF
RECORD FOR PRINTING

Now comes Clark Squire, Collector of Internal Revenue, appellant in the above entitled case, and designates the entire record for printing.

/s/ THERON L. CAUDLE,
Assistant Attorney General,
Attorney for Appellant.

Receipt of the within Appellant's Designation of Record for Printing is acknowledged this..... day of December, 1949.

.....
JOHN W. FISHBURNE,
Attorney for Appellee.

[Endorsed]: Filed December 23, 1949.

No. 12406

United States
Court of Appeals
for the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue,
Appellant,

vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION, a Cooperative Agricultural Corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

FILED
APR - 5 1950

PAUL P. O'BRIEN,

CLERK

No. 12406

United States
Court of Appeals
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CLARK SQUIRE, Collector of Internal Revenue,
Appellant,

vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION, a Cooperative Agricultural Corporation,
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SUPPLEMENTAL
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Appeal from the United States District Court,
Western District of Washington,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Clerk's Certificate to Supplemental Record on Appeal	106
Proceedings	55
Witnesses, Plaintiff's:	
Goettsch, A. J.	
—direct	65
—cross	77
—redirect	83
—recross	84
Watts, E. S.	
—direct	84

In the District Court of the United States for
the Western District of Washington, Southern
Division

Number 1157

SUMNER RHUBARB GROWERS' ASSOCIA-
TION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

Transcript of proceedings had before the Honor-
able Charles H. Leavy, United States District
Judge, in the above-entitled and numbered cause
in the above-entitled court, on the 16th day of May,
1949, at Tacoma, Washington.

Appearances:

JOHN W. FISHBURNE, ESQ.,
Tacoma, Washington,
appeared for the Plaintiff;

THOMAS R. WINTER, ESQ.,
Assistant United States Attorney,
appeared for the Defendant.

PROCEEDINGS

The Court: Now, Docket 1157, Sumner Rhubarb
Growers' Association vs. Clark Squire.

Mr. Fishburne: I had hoped to submit this and
obtain a pre-trial order on it but the Government

had a general denial in and it was impossible for me to do that. I am sorry that we haven't done it. I still think it could be done if Mr. Winter and I would get together on it.

The Court: The amounts involved here are very small.

Mr. Fishburne: Very small, yes, sir. The Sumner Rhubarb Growers' Association is a cooperative and the Government has admitted that certain of the employees are exempt from the Social Security tax. But the point, as I see it now, is whether or not—it is purely and simply whether—the persons who work in the office, the manager and those persons who are not actually doing the labor—are exempt also. That is the only question that is before this Court. The Plaintiff takes the position that the Corporation is exempt under 101, Title 26, Section 101 of the Code, and also sub-section (1) and sub-section (12)—that we come under both of those sub-sections. The Government takes the position that only those persons actually doing agricultural work under sub-section (1) of Section 101 are exempt and that we, therefore, have to pay the Social Security tax on [2*] those persons who are not doing actual manual labor, defined as agricultural labor. Is that correct, Mr. Winter?

Mr. Winter: No. I don't think I follow counsel.

The Court: Well, the substance of Counsel's statement is that under the laws and regulations the

* Page numbering appearing at top of page of original Reporter's Transcript.

employees of the cooperative are exempt excepting the office people.

Mr. Winter: No. The point is this, your Honor: That under the Social Security Act, certain organizations are exempt entirely; hospitals, eleemosynary corporations, labor or agricultural organizations such as the A. F. of L., the Grange, or some other organizations which are non-profit organizations and merely associations for a purpose. However, there is also exempt from income tax farmers' cooperatives, under Section 101 (12) — from 101 (12) — farmers, fruit growers or like associations organized and operating on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of the sale less marketing expense.

It seems to me that they have raised two issues here. If the Court were considering an organization under 101 (1), no matter what their employees, no matter what their employment or what they did, they wouldn't be under the Social Security Act. The Government would have no case. However, if they are under 101 (12) they are under the Social [3] Security Act. However, the Act goes further and exempts agricultural labor. Then it becomes a question as to whether or not they come under the exemptions of the agricultural labor of the Social Security Act or whether such employees are not specifically exempt as agricultural labor. There have been a number of cases on that point. One court held that dairy workers—I think your Honor re-

viewed those that held that some of the employees which were building fences in the nature of carpentry work for these dairies were exempt as being in the production of milk or the production of agriculture. It is the Government's position that while this is a farmers' organization, the wages paid to these individuals—there are three individuals who were the bookkeeper—I forget—I am not familiar—but they were office help and not in the packing or business of producing. That is, they weren't engaged in maintenance of equipment in the performance of a major part of the farm work. The services here were not performed on a farm or for a farmer. So, only Section 1426 (4) can apply. It refers to services as handling and says nothing of maintenance of equipment and it is our position that the bookkeeper is not handling the fruit. He is not handling the packing of the material and, therefore, not exempt.

The Court: Do you concede that the concern of this nature, operating to the extent that this one did, has [4] to have a bookkeeper?

Mr. Winter: Yes, your Honor. They had to keep books and maintain records. There is no question about that. They were operating in the nature of a business. There is no question about that.

The Court: I am wondering if we can't now have an oral stipulation that will cover pretty much the question of fact.

Mr. Fishburne: I believe so; yes, sir.

The Court: There should have been a pre-trial

conference order. Can it be stipulated that the Plaintiff is a cooperative agricultural corporation, Mr. Winter?

Mr. Winter: Your Honor, I don't know. I assume that is a fact. They file claims for exemptions and the Commissioner ruled on their exemptions. I don't have them. At the time this case was started, the only information I had——

The Court: That is the reason we should have had a pre-trial conference.

Mr. Winter: I suggested to Counsel that he prepare a proposed stipulation and I didn't hear from him.

Mr. Fishburne: I looked at his Answer and he denied that we were a corporation.

The Court: The fact that you were a co-op could have been submitted and agreed to. [5]

Mr. Winter: The last information I have is that the Commissioner has now under consideration the question of Plaintiff's exemptions under Sections 101 (1) and 101 (12) of the Internal Revenue Code.

The Court: Is that 28 U. S. C.?

Mr. Winter: 26, sir.

The Court: 26?

Mr. Winter: I have it right here. You see, the claim for refund attached to their claim says we claim income tax exemptions under section 101 as well as section 101 (12). But, we certainly do not concede that they are an agricultural organization exempt under 101 (1). We can not stipulate to that

and it is my—I think they have claimed exemptions under 101 (12) too.

The Court: Of course, we should settle this matter. Can you agree whether they are an organized agricultural corporation? That should be a matter that you can very quickly determine because the articles of incorporation should be available.

Mr. Fishburne: We have those; yes.

Mr. Winter: From the Commissioner's letter—this office has been unable to give favorable consideration that all services performed are exempt. I can not stipulate that it is exempt under that section of the statute—101 (12).

The Court: You can stipulate very readily as to whether or not they are organized under the laws of the State of Washington as a cooperative agricultural corporation, because that is only a matter of their articles of incorporation.

Mr. Winter: Your Honor, I would like to so do but I have no information on that.

The Court: That is why we have pre-trial conferences. Do you have the articles here?

Mr. Winter: You see, they are claiming under 101 (1). That is their claim and allegation here.

Mr. Fishburne: We have the articles at the office.

The Court: You should have them here.

Mr. Winter: I can say we might be able to get on with it. I might be able to stipulate if they will so testify. I think that they will but I have no information, your Honor.

The Court: That is why we have pre-trial con-

ferences. You can sit at a table and stipulate. If they testify, then a pre-trial on that matter wouldn't serve any purpose.

Mr. Winter: If such a request had been received, I would have sent it to Washington and gotten the file to find out about it.

Mr. Fishburne: I asked you about it by phone.

The Court: Do you have the articles available?

The Court will pass upon that issue.

Mr. Fishburne: He has them in the Fidelity Building.

The Court: Let's go to the next point. Defendant admits——

Mr. Winter: I didn't prepare the Answer.

The Court: It admits two and denies two on information and belief. That refers again back to the articles of incorporation.

Mr. Fishburne: Yes; I copied from the articles of incorporation when I put this paragraph in.

The Court: I don't want Mr. Winter to stipulate. You see, you have ignored the Court's request for a pre-trial order so that I am taking the matter up now. We will have to wait for the articles on the first part of 3. Now, the next part. "Plaintiff——" you can stipulate to that, I assume, Mr. Winter.

Mr. Winter: Paragraph?

The Court: That is the second paragraph in paragraph 3.

Mr. Winter: Yes. I am sure that is a fact, your Honor.

The Court: Now then, the next paragraph, beginning with line 8. [8]

Mr. Winter: Beginning with line 8.

The Court: Yes.

Mr. Winter: I have no information on it, your Honor. I don't know whether that is a fact or not.

The Court: All you would need to do without formal proof would be to ask the President, or any other officer, unless you are prepared to deny it.

Mr. Winter: I am not prepared to deny it, your Honor.

The Court: Because these are just simple matters and a failure to prepare a pre-trial order and a failure by your Department to admit simple facts ready of proof defeats the whole purpose of pre-trial orders.

Going to paragraph 4: "The operation of the Sumner Rhubarb Growers'——"

Mr. Winters: We have no proof to the contrary, your Honor.

The Court: But you are not ready to stipulate. You don't feel you have authority?

Mr. Winter: Well, the allegations were denied on information and belief by the Attorney General. They have given me no further information on it.

The Court: The rules of procedure permit that. That is why you are to sit down around your table and hear the story and stipulate facts. If you had your articles [9] here we would save time by having the President put on the stand. The Department, I hope, isn't going to take the arbitrary position that

these simple matters that they are not prepared to controvert will always have to be heard in open court.

Mr. Winter: Well, as I say, your Honor, I realize these are informal matters and I contacted Counsel and asked him to submit a pre-trial stipulation.

The Court: Well, the only way to make your pre-trial order is to sit down at a table and then see what you know is going to be proven and then you stipulate.

Mr. Fishburne: I spent the greater part of the morning trying to figure out the stipulation. He was in Seattle——

The Court: You can't carry through a stipulation in that manner. Very well, as soon as this officer of the Plaintiff corporation gets back with the articles we will take that up. Now, paragraph 5. That is denied. Their claim for exemptions. What is your position in reference to that, Mr. Winter? Taking the first paragraph of it: "During the year 1931——"

Mr. Winter: Our position was that during the year 1931 an exemption under Section 103 (12) of the Internal Revenue Act of 1928 was granted. We admit that but we deny that from October 1, 1942, to June 30, 1946, it was [10] maintained for tax exemption; and, they have never furnished the Commissioner proof of any such claimed exemption.

Mr. Fishburne: Of course, we take the position

that since we might come under sub-section (1) and sub-section (12)—both of them——

The Court: Section 103 (12)——

Mr. Winter: That is a corresponding section to 101, your Honor, in the 1928 Act.

The Court: Well, the number now is what?

Mr. Winter: 101, your Honor. There are some differences but I don't think they are particularly material as to the nature of the defense. There were some added classifications added to the later Acts by Congress.

The Court: Is there any issue here as to whether this claim was timely filed?

Mr. Winter: I don't think so, your Honor.

Mr. Fishburne: They admit that.

Mr. Winter: I think we have admitted that.

The Court: Very well. Is your man here?

Mr. Fishburne: He hasn't come but I can put the President of the organization on.

The Court: Of course, Mr. Winter will stipulate that the articles are as here testified.

Mr. Winter: I will make no objection to the articles [11] and they may go in.

The Court: He hasn't got them here.

Mr. Fishburne: But we can have the President testify what the company does and the assistant manager.

The Court: Very well. You may proceed with your proof. I want to suggest to Counsel for the Government that I want pre-trial conference orders

prepared and you will have to make arrangements to get together and work things out.

Mr. Winter: I appreciate that, your Honor. I might say that I have been so busy. I always try to get counsel to submit it to me. I am sorry we didn't do it in this case, but things just piled up on me.

The Court: Proceed.

Mr. Fishburne: Mr. Goettsch. [12]

A. J. GOETTSCH

called as a witness for and on behalf of the Plaintiff, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Fishburne:

Q. Give your name, please?

A. A. J. Goettsch.

Q. Where do you live?

A. Sumner, Washington.

Mr. Winter: What was the first name?

The Witness: A. J.

Q. (By Mr. Fishburne): And you are one of the officers of the Sumner Rhubarb Growers' Association?

A. I am a manager of the Sumner Rhubarb Growers' Association.

Q. And how long have you been manager?

A. Since—well, just this season. Since January 1, 1949.

(Testimony of A. J. Goettsch.)

Q. And before that what was your capacity in the Association?

A. Before that, for approximately three years, I was the assistant manager.

Q. And do you hold any other office in the Association? [13] A. No.

Q. Are you a farmer? A. No, sir.

Q. As manager of the Association, what have been your duties?

A. Selling rhubarb and purchasing supplies necessary for the packing of hot house and out door rhubarb.

Q. Give the Court the picture of the Association, with reference to these buildings it operates in, and exactly what it does.

A. We have——

The Court: Well, would it be conceded before three years before this date? He said his connection goes back three years.

The Witness: I have been employed by the Sumner Rhubarb Growers' Association since 1938. Prior to my appointment as assistant manager I was a clerk.

Mr. Winter: You were a clerk?

The Witness: Yes.

The Court: That puts you back far enough then to cover the period involved here.

Mr. Fishburne: Back to '38. Yes. It is plenty far back.

(Testimony of A. J. Goettsch.)

Mr. Winter: October 1, 1942, to June 30, 1946, is the period involved, isn't it? [14]

Mr. Fishburne: Yes.

Q. (By Mr. Fishburne): So that you have been familiar with the Sumner Rhubarb Growers' Association activities—you have been intimately attached to them—since 1938? A. Yes.

Q. Will you tell the Court as clearly as you can the operation of the Rhubarb Growers' Association? Explain to him the way the buildings are and what type they are.

A. The Sumner Rhubarb Growers' Association operates in a leased building, frame construction, the size of which is, approximately, two hundred feet long and varies from about sixty feet wide to one hundred fifty feet at the other end. This building is used for the purpose of receiving rhubarb from the growers, which is already packed in fifteen pound net boxes, and the rhubarb is brought into the building by truckers, employees which are mostly high school boys who come on after three-thirty in the afternoon and they work until six-thirty or seven loading trucks with rhubarb or cars with rhubarb, sending out express shipments. When this rhubarb is received by the Association in these fifteen pound boxes it is graded at the—on the farms where it is packed by the growers. The Association employees put on a label. The rhubarb is classified in three different grades. Those are fancy, [15]

(Testimony of A. J. Goettsch.)

extra fancy, and choice. Then the distribution is made according to orders, sales orders.

Q. Is there any rhubarb received at the shed or in the building, Association's building, other than rhubarb from members of the organization?

A. None.

Q. All members of the Rhubarb Growers' Association deliver all of their rhubarb to the Association?

A. All of the hot house rhubarb and during the field season they deliver.

Q. I didn't get that.

A. During the outdoor shipping season they deliver practically all their outdoor rhubarb, but after we are through shipping outdoor rhubarb to the East, then, of course, some of the growers sell to local markets.

Q. And the boxes that the rhubarb is packed in, where do the farmers get those?

A. For the convenience of the farmers the Association buys the boxes during the off season and we have them made up so that the grower can get just the number of boxes that he requires, either knocked down or made up.

Q. And is there any other equipment that you acquire — that the Association acquires — for the farmer?

A. None; only what has to do with rhubarb and the shipping of it. [16]

(Testimony of A. J. Goettsch.)

Q. Is the rhubarb packed on the farm or in the shed? A. It is packed by the farmer himself.

Q. It is packed by the farmer himself and graded by the farmer? A. That is right.

Q. On his farm? A. That is right.

Q. And then delivered to the Association?

A. And then delivered to the Association.

Q. Now, what are the periods of—what are the active periods in the Association, for the Association?

A. Well now, this season we received our first hot house rhubarb on the 17th of January and summers we go until now. We will be through on the—next Friday, which will be—20th of May.

Q. From January to May; is that about the season each year?

A. That is about the season each year; yes.

Q. And was that about the season from 1938 up to the present time? A. Yes.

Q. Now, as manager of this organization, what are the duties?

A. The duties are to sell the rhubarb.

Mr. Winter: Let me ask a question. Are those duties in the articles?

The Court: I wouldn't imagine they would be. They might be in the by-laws.

Mr. Fishburne: They are in the by-laws.

Mr. Winter: I would suggest you introduce the by-laws.

(Testimony of A. J. Goettsch.)

The Court: Well, Mr. Fishburne doesn't have either the by-laws or the articles.

Mr. Fishburne: Here. Everything is in this book.

The Court: I don't think there is any use in marking it and placing it in the record. Just take a look at it.

Mr. Fishburne: If I may submit this to Mr. Winter.

Mr. Winter: Let him testify to it. He doesn't need to testify from it.

Mr. Fishburne: You can use the book for what it is worth.

A. (Continuing) Well, the duties of the manager would be the same as any other company's in business.

The Court: Let's go back a little. We are going into matters now that can't be very seriously disputed. Are you familiar with the document you hold in your hand?

The Witness: Yes.

The Court: Do you know what it is? [18]

The Court: What is it?

The Witness: Articles of incorporation and the by-laws of the Company and the minutes of the board meetings from January 31st until 1940, October 8, 1940.

The Court: And it provides for a manager, does it?

The Witness: It does.

(Testimony of A. J. Goettsch.)

The Court: And under the scheme of operation, how do you operate? You are the manager and what are the requisites for membership?

The Witness: The requisites are that only those interested, or who are growing hot house rhubarb are members of the Association.

The Court: And its finances——

The Witness: Well, in order to obtain finances for the expenses which are necessary we make a deduction of twenty cents a box for each box of rhubarb delivered to the Association. Then at the end of the year this deduction is probably greater than the actual expenses of the Association so that the amount over and above deductions is set up as a reserve to the grower, the liability payable to the grower, and the refund to the grower is made the following year based on the boxes that the grower has delivered.

The Court: Then this Association sells and finds the market—their managing officers and employees?

The Witness: Yes.

The Court: And then the proceeds of the resale, how are they distributed?

The Witness: They come back to the Association and we have what we call weekly pools. The growers from that weekly pool are paid on an average of each grade if it is sold by our brokers.

The Court: Do you want to look at these articles?

Mr. Winter: No, sir. I think it is a regular

(Testimony of A. J. Goettsch.)

co-op. That is all I wanted him to testify to. I thought so all the time, your Honor.

The Court: Well, the Court will find as a fact that this is a cooperative and organized under the laws of the State of Washington and has been such from the date shown in these articles.

Mr. Winter: When was it organized?

The Witness: January, 1931.

Mr. Winter: January what?

The Witness: No. April 24, 1930.

Mr. Winter: All right. I would suggest—Counsel, do you have that letter from the Commissioner?

Mr. Fishburne: Yes.

Mr. Winter: I would suggest putting that in evidence.

The Court: And you handle nothing but rhubarb and [20] nothing but the rhubarb grown by your members?

The Witness: That is right.

The Court: And you distribute back to them what you have over expenses and what you place in your reserve fund?

The Witness: That is right.

The Court: I think that boils it down to an issue, as Counsel concedes, that this is a corporation which would be exempt—that it would be a corporation exempt under 101 (1), or do you still maintain—

Mr. Fishburne: We still take the position that, if the exemptions exempt the workers in the organization as agricultural because they are agricul-

(Testimony of A. J. Goettsch.)

tural workers, there is no distinction that under the definition——

The Court: That is what I am trying to get to. If you will stipulate that there is one issue left here of whether or not the office employees are or are not exempt.

Mr. Fishburne: That is it.

Mr. Winter: Yes, sir. We stipulate that that is the sole issue in the case.

The Court: Well, it wasn't when you required proof that it was a cooperative, but that fact has been established.

Mr. Winter: That is right. But, there is the further issue whether it is exempt under 101 (1) or 101 (12). [21]

The Court: I don't care very much which one it is exempt under.

Mr. Winter: But no matter what their employees may be—no matter what their occupations may be—if they are exempt under 101 (1), the Government has no case because the Social Security Act said no Social Security Tax——

The Court: I am rather familiar with that.

Mr. Winter: Here is the statute.

The Clerk: Plaintiff's Exhibit 1 marked.

Mr. Fishburne: Your Honor——

Mr. Winter: It exempts for employment performed—exempts from the income tax under Section 101 (1)—referring to the Internal Revenue Code. Now, if it is only exempt under 101 (12),

(Testimony of A. J. Goettsch.)

then it would be exempt only if the labor performed was agricultural labor within the terms of the act and it is our position that it is not exempt agricultural labor, even though performed for a coop.

Mr. Fishburne: We take issue right there. Assuming what Mr. Winter said is correct, we find that is correct only insofar as income tax and does not apply to the Social Security tax. It applies only with reference to income tax and not Social Security tax.

The Court: Income tax of the individual?

Mr. Fishburne: Of the Association with reference to agricultural labor. [22]

The Court: Does this Association have an income tax?

Mr. Fishburne: No, sir.

Mr. Winter: It has been ruled as exempt under 101 (12) back in '31.

The Court: Let me ask you a few more questions. You have, in your four month's operating season, several packers and truckers and loaders employed?

The Witness: Just truckers and loaders.

The Court: Do you pack and grade these products?

The Witness: No.

The Court: The farmer does that?

The Witness: The farmer does that on his own farm.

(Testimony of A. J. Goettsch.)

The Court: And then do you have selling agents out?

The Witness: No. The rhubarb in the markets—we have a broker in Seattle who goes to the different wholesale houses and picks up the orders and phones them in to us. We ship the rhubarb by railroad express.

The Court: I don't care for you to go into that. Now, how many employees do you have in this freight department work, hauling and loading and shipping out?

The Witness: I believe our maximum this year was twelve. [23]

The Court: During this four month period?

The Witness: Yes.

The Court: Then who else do you have that draws a salary check from the cooperative?

The Witness: Well, myself and the office girl. Mr. McLain who is the treasurer is also the warehouse foreman. He receives his remuneration for being warehouse foreman. And then we have the man that receives our——

The Court: Is he a four month employee or a twelve month?

The Witness: No, he is just less than four months.

The Court: Is he counted as part of your office staff?

The Witness: No. He has nothing to do in the office.

(Testimony of A. J. Goettsch.)

The Court: Are his wages involved in this controversy here?

The Witness: I believe that the wages involved in this controversy are myself and the office girl's.

Mr. Winter: Just the two of them.

The Witness: Just the two.

Mr. Winter: The Assistant Manager too.

Mr. Fishburne: The manager, assistant manager, and the office girl.

Mr. Winter: Yes. [24]

The Court: Well now, do you work twelve months of the year?

The Witness: No.

The Court: The time spent with the rhubarb association is about 5½ months; and the others, the office girl, does she?

The Witness: No, she only works the same.

The Court: You close the establishment, close down, when the rhubarb season is over?

The Witness: That is right.

The Court: And that is a month or two beyond the actual delivery season?

The Witness: Well, we usually try to close up everything by the end of May and then, of course, there are a few reports and things to get out during June, quarterly reports, and she comes back and spends a day or two.

The Court: The Association can't do any other business of any kind excepting handling rhubarb?

(Testimony of A. J. Goettsch.)

The Witness: That is right; and procuring boxes, of course.

The Court: And they keep records of what they handle?

The Witness: That is right.

The Court: Of not only salaries but disbursements of whatever they have? [25]

The Witness: Yes.

The Court: I think that is all.

Mr. Fishburne: For the purpose of the record I can read their purposes into this record.

The Court: No; I don't think it is necessary at all. I think Mr. Winter acknowledged it was a cooperative.

Mr. Winter: That is right.

Mr. Fishburne: I will offer this letter, Plaintiff's Exhibit Number 1, as evidence in this case.

Mr. Winter: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 1 for identification received in evidence.)

Mr. Fishburne: Do you want to cross-examine?

Mr. Winter: Yes.

Cross-Examination

By Mr. Winter:

Q. You were the manager; and who was the assistant manager?

A. I was the assistant manager and Mr. Matson

(Testimony of A. J. Goettsch.)

was the manager last year and for this season I have been the manager.

Q. Mr. Matson is just one of the growers there?

A. Director now.

Q. Well, you were assistant manager from 1938, I believe? [26] A. No; 1945.

Q. 1945? A. Yes.

Q. What did you do before that?

A. Clerked in the office prior to 1945.

Q. You mean keeping the books?

A. Keeping the books.

Q. And keeping the tabs on shipments?

A. That is right.

Q. And preparing the payrolls?

A. Well, partly payrolls and——

Q. General office work?

A. General office work.

Q. Now, as manager, do you contact your broker? The Association has brokers that handle the products? A. That is right.

Q. And you contact the brokers for selling the products? A. That is right.

Q. And do you contact the trade in going out and selling yourself any?

A. Just the Eastern trade; contacting the brokers in the East for shipments East.

Q. Is that by correspondence? [27]

A. Telephone and telegram.

Q. Now, what does a member do to get into the Association? Does he pay a fee?

(Testimony of A. J. Goettsch.)

A. He signs a marketing agreement and the membership fee is \$1.00.

Q. Under the marketing agreement he has to sell all of his product? A. All of his hot house.

Q. And after you stop shipping, then he can sell it elsewhere? A. That is right.

Q. What do you do if they sell to somebody else during the——

A. We have never had a case of that kind.

Q. You never found them doing it?

A. No.

Q. And you attempt to get the highest market you can for the product?

A. We attempt to get the highest market we can; yes, sir.

Q. And you pay him eighty per cent of what he has coming and then retain twenty per cent?

A. No. It is twenty cents a box.

Q. Twenty cents a box? A. Yes.

Q. What [28] is a box; what was the—what would be the average price of a box the past couple of years?

A. For the three grades this year they will average \$2.85 extra, \$2.70 fancy, and \$2.10 for a box of choice.

Q. You deduct twenty cents regardless of price?

A. Yes.

Q. Does the grower get the price that his particular rhubarb sells for on a particular day, or the weekly average? A. The weekly average.

(Testimony of A. J. Goettsch.)

Q. If he took in a carload today and got \$3.00 for it and then the market went off to \$2.50, he would only get \$2.50, although you got \$3.00 for his rhubarb?

A. If you sell part at \$3.00 and part at \$2.50, your average would be \$2.75.

Q. Well, he would get the average?

A. Yes.

Q. You don't try to ear-mark a particular shipment? A. No.

Q. And then for this year's crop you pay them next year?

A. Well, we pay them for it over and above the twenty cents a box. The amount——

Q. That you don't use for cost of the Association? A. Yes. [29]

Q. Now, last year's—the surety proceeds, which amounted to eleven thousand dollars were paid——

A. Around the 5th of April this year.

Q. About what percentage of the twenty cents does it cost to operate your Association?

A. Well, figuring on the 1948 charges, it was about between 14 and 15 cents a box cost to operate.

Q. And the other four or five cents is returned to the farmers, prorated? A. That is right.

Q. In other words, he would get back, you would prorate his share depending on the cost and number of boxes which he shipped?

A. Depending on the number of boxes he shipped; yes.

(Testimony of A. J. Goettsch.)

Q. Now, you work as manager. Have you covered your work as manager?

A. Yes; selling and purchasing supplies.

Q. When do you purchase your supplies, in the fall, or off season? A. Yes.

Q. Well, that takes some part of your time?

A. During that time I am employed by another party.

Q. Yes, but you are working and doing that and it takes time? A. Yes. [30]

Q. You have to go around and visit different concerns?

A. It is done mostly by phone from my other position.

Q. What is your other position?

A. Foreman in R. I. McLaughlin Company at Puyallup, Washington, packing berries, cold packing berries.

Q. Then you go over there and cold pack berries?

A. Yes.

Q. Are you manager there?

A. Plant foreman.

Q. How long have you been doing that?

A. Since 1936.

Q. What does the clerk do at the end of the four month period?

A. She is a married woman and goes back to her household duties.

Q. She just works January through May?

(Testimony of A. J. Goettsch.)

A. Yes.

Q. You finish packing in May and she has some work to do after that, clerical work?

A. Well, no. There are a few reports to make out after the 5th of June. That is, make up the bank balances and probably—but the time spent on that——

Q. Does she get paid by the hour or week?

A. By the month. [31]

Q. By the month? A. Yes.

Q. Would she be paid for the month of June?

A. About half a month.

Q. About half a month? A. Yes.

Q. When do you compute the percentages that you will give back?

A. After the annual audit by Mr. Watts.

Q. When is the annual audit?

A. Made after May 31st, as soon as the records are ready.

Q. Is that part of the work you will do?

A. Yes.

Q. And she will help prepare the checks and the bookkeeping necessary, won't she?

A. There is only a few minor details left after we close up.

Q. How many members do you have in the Association? A. 103.

Q. About 103? A. Yes.

Q. Is it growing—less or more than in the past years?

(Testimony of A. J. Goettsch.)

A. It is starting to grow again now that — I would [32] say it is an average of 103 for the past five years.

Mr. Winter: I think that is all.

Redirect Examination

By Mr. Fishburne:

Q. Will you tell us where the office is with reference to the packing—the place where the boxes of rhubarb are stored preliminary to shipment?

A. It is in the same building.

Q. It is in the same building?

A. Yes. There is just a partition between.

Q. How do you get from the place where the boxes are stored into the office; is there a door there?

A. There is a door through the partition.

Q. Is there a stairway?

A. No stairway. It is a single story building.

Q. All on one floor? A. That is right.

Q. As manager, do you ever do any loading?

A. No; no loading. Sometimes I do some receiving.

Q. You do receiving? A. Oh, yes.

Q. And what does that consist of?

A. Well, just taking the boxes off the truck and piling them on the platform.

Q. You still get paid as a manager? [33]

A. That is right.

Q. There is no distinction between your work when you work in the shed receiving boxes and do-

(Testimony of A. J. Goettsch.)

ing manual labor; there is no difference in your pay? A. Not a bit.

Q. You still get paid as manager of the Association? A. That is right.

Recross-Examination

By Mr. Winter:

Q. In your claimed refund you said not more than twenty-five per cent of your time was doing that; is that right? A. That is right.

Mr. Winter: That is all.

Mr. Fishburne: That is all.

The Court: That is all.

(Whereupon, the witness was excused.)

Mr. Fishburne: Mr. Watts. [34]

E. S. WATTS

called as a witness for and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fishburne:

Q. Give your name, please.

A. E. S. Watts.

Q. What is your business?

A. Certified Public Accountant.

Q. And as such have you been acquainted with the Sumner Rhubarb Association? A. Yes.

Q. For what period of time?

A. I think my period started about 1940.

(Testimony of E. S. Watts.)

Q. You kept the books for the Sumner Rhubarb Association from 1940 and are still keeping them?

A. No; I don't keep the books at all.

Q. You don't keep the books but you have audited their accounts?

A. Yes.

Q. You have followed the history of this issue with the Government from, since you have been in there auditing the books?

A. I raised the issue.

Q. And you have a power of attorney? [35]

A. Yes.

Q. From the Sumner Rhubarb Association and have had for some time?

A. Yes.

Q. And you raised the issue that is involved in this case?

A. Yes.

Q. Then you are familiar with this Exhibit Number 1, addressed to you?

A. Yes.

Q. Now you are familiar with the correspondence between the Government and yourself with reference to this issue?

A. I handled all the correspondence.

Q. Will you give to the Court from the beginning, as briefly as you can, the history of this issue?

Mr. Winter: We will object to it as irrelevant and immaterial.

The Court: I don't care to go into that. The Court has the responsibility irrespective of the attitudes of the enactor of this or the Commissioner of Internal Revenue. You might prove by this witness that these small payments were made by the Plain-

(Testimony of E. S. Watts.)

tiff cooperative association over its objections or with its approval. [36]

Q. (By Mr. Fishburne): Mr. Watts, the Social Security payments which are claimed here were made with or without your approval?

A. We stopped the filing of claims about 1944 as I remember, or 1945, and then from there on if any were made they were made with or under protest.

Q. And you have always—and you have made the claim for refund in each instance?

A. Yes. Or a claim for refund.

The Court: That includes the three years involved?

The Witness: Nothing has been paid since 1946 and only on the two office—officers or office employees.

Q. (By Mr. Fishburne): Now, the exemption which you claimed in 1940, was that—is that—the same exemption you are claiming under now?

Mr. Winter: Now, if the Court please—

The Court: He may answer. It might be material.

A. There was no claim made in 1940. If you are speaking for 1940. The claims were made in 1946 going back to 1942, or as far back as the statute of limitations would permit. Up to that time it was—they had established income tax exemptions in 1931 which prevailed but this last year when the Commissioner ruled that they were not exempt. [37]

(Testimony of E. S. Watts.)

He revoked, or attempted to revoke, the income tax exemptions because, as he says, we refused to file——

Mr. Winter: We will object to that.

Mr. Fishburne: I want the Court to get the picture.

The Court: I don't think the income tax controversy——

Mr. Fishburne: Why——

Q. (By Mr. Fishburne): What income tax would they have to pay, Mr. Watts?

A. None under the law.

The Court: Well, under the law, is it your contention that they must pay income tax?

The Witness: The Commission attempted to revoke the income tax exemptions.

The Court: On the grounds that this was not an agricultural cooperative?

The Witness: He says on the grounds that they refuse to furnish information and has made the revocation retroactive to January 1, 1939.

The Court: In Social Security, but income tax——

The Witness: It affects the Social Security tax because insofar as, if they are exempt under Section 101 (1) they are automatically exempt from Social Security Tax. If they are exempt under Section 101 (12), then they are [38] exempt from Social Security tax upon agricultural labor, but there is a question as to whether the other labor is a necessary adjunct to the operation.

(Testimony of E. S. Watts.)

Mr. Fishburne: That is what I wanted to get in the Court's mind. The distinction between those two. We claim both.

The Court: Well, the act that you have cited to me is the act dealing with Social Security tax as distinguished from income tax.

Mr. Fishburne: That is right.

Mr. Winter: 101?

The Court: Yes.

Mr. Winter: No. 101 is your statute dealing with income taxes, and the Social Security Act says that any corporation exempt from income taxes under 101 (1) is exempt from Social Security Tax; but any corporation exempt under Section 101 (12) is not exempt from income, from Social Security, tax; except where the wages are less than forty-five dollars a quarter. Where they are exempt as agricultural labor under the Social Security Act——

Mr. Fishburne: Now in that letter——

The Court: I would rather stay away from that letter. What I am trying to get clear—and we can make a quick disposition of this case—is this: Subsection 12 of Section 101 exempts from tax the following: Now what tax [39] is it, income or Social Security?

Mr. Winter: Income tax.

The Court: 101 (12) deals entirely with income tax?

Mr. Winter: That is right.

(Testimony of E. S. Watts.)

The Court: Well, clearly Plaintiff corporation is exempt from income tax.

Mr. Winter: The Social Security tax act does not refer to Section 101 (12). The only reference in Social Security tax is to Section 101 (1). In other words, the Social Security tax says if you are exempt under Section 101 (1), you are exempt from Social Security tax.

The Court: Then is this an agricultural or horticultural organization or a cooperative?

Mr. Winter: Or a cooperative.

The Court: Well, the statute uses the language organization. They might have an association or a cooperative or anything else and, if the answer to that is in the negative, then the employees if they otherwise meet the requirements of the statute can be subject to Social Security.

Mr. Winter: That is right.

The Court: If it is in the affirmative, that is the end of the case.

Mr. Winter: Then that is the end of the case.

The Court: I would like to hear from you, Mr. Winter, as to why it should not be in the affirmative.

Mr. Winter: Because it is not an association.

(Whereupon, the witness left the witness stand.)

The Court: I had no briefs in this case so that I am rather handicapped.

Mr. Winter: Your Honor has a ruling of the Commissioner that it is not exempt under 101 (1).

The Court: You don't mean to say——

Mr. Winter: Nor has it been granted exemption under 101 (12).

The Court: You don't mean to say that the Commissioner's ruling becomes the law of this Court.

Mr. Winter: No. But an agricultural corporation may be organized for profit and where its entire business would be agricultural you would have an association.

The Court: There is no issue here of this being an organization for profit.

Mr. Winter: No; but it certainly comes within 101 (12). It can't come under both.

The Court: There would be no reason in the world why it couldn't, as the Court reads that Act. 101 (1) is just a very general statement.

Mr. Winter: This is a corporation. It isn't an association. It is a corporation organized under the laws [41] of the State of Washington, and not an association. It couldn't come under 101 (1).

The Court: 101 (1) doesn't say so. It says organizations.

Mr. Winter: Organizations may mean anything. It may be a partnership. But, 101 (12) says farmers, fruit growers, or like associations, organized on a cooperative basis for the purpose of marketing products for producers and turning back to them proceeds from sales less marketing expense. That is exactly what it is.

The Court: But it goes further than that.

Mr. Winter: They have never exempted——

The Court: You are familiar with this and neither Mr. Fishburne or yourself furnished the Court with a brief. Agricultural workers were exempt from Social Security tax——

Mr. Winter: That is right.

The Court: But I haven't that statute before me. But, we get back to an examination of 101 (1) as to whether the bookkeeper and clerk were agricultural workers——

Mr. Winter: That is the sole issue in the case, it seems to me, and it is our position that regarding that — with respect to agricultural labor — under H——

The Court: What is the citation?

Mr. Winter: Your Honor?

The Court: Is there a law? [42]

Mr. Winter: That is the statute and the regulations——

The Court: Well, give me the section.

Mr. Winter: It is section 1607 (1) of the Act.

The Court: And what volume?

Mr. Winter: That is Title 26, your Honor. Title 26, Section 1607.

The Court: And what is this, agricultural labor?

Mr. Winter: Yes, your Honor.

Mr. Fishburne: Isn't that the section dealing with unemployment?

Mr. Winter: I have got the—that is—it is 1426 H of the Act, the same Title 26.

The Court: 1426?

Mr. Winter: H.

The Court: H?

Mr. Winter: The term agricultural labor includes all services performed on the farm in the employing of any person in connection with cultivating the soil or in connection with harvesting any——

Now, this wasn't on a farm. The labor wasn't performed on a farm. However, it was in connection with marketing so it comes under Section 1426 H (4) "in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to [43] markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market."

It is the Government's position in these cases that the exemptions apply to all of the services necessary in handling the marketing of the product; the agricultural product. But, the employees in the office—the office employees are separate and are not within the exemptions and it is upon the taxpayer—as I pointed out in the Gaylord Guernsey Farms case it was held that some employees in repairing fences and the bookkeepers involved in that case were granted exemptions. However, they came under 1426 H 1. They were working on the tools and equipment within the farm that was necessary to produce the agricultural or dairy products. There

is a District Court case—Wilson Company v. United States. It is not officially reported; at least not at the time I got my citations. In the findings and conclusion of law entered April 13, 1948—well, in another case we lost a case with respect to the mechanics repairing milk trucks on the farm; and in Jones v. Geerny, the Government lost the case with respect to the service of the farmers for the maintenance of its tools [44] and equipment. But, it is our position, and sole position in this case, that it doesn't come within the handling and delivering and it is a separate occupation, and, therefore, doesn't come within the exemptions which have been granted or allowed in the Jones and Geerny.

The Court: Do you have anything, Mr. Fishburne? Do you have any citations?

Mr. Fishburne: I didn't think a brief was necessary.

The Court: It is highly necessary in any Internal Revenue case because the law is extremely complex and it is loaded with literally hundreds, if not thousands, of regulations that have qualifying effects and some of them are such as could well be questioned.

Mr. Winter: There is Larson v. Ives in 154 Federal 2nd.

The Court: I think I will take a short intermission. I want to reread these statutes that you have cited because the difficult situation that we have presented here is the involvement of the income tax and Social Security tax. Are you familiar with the case——

Mr. Winter: What case?

The Court: The case of Rucker——

Mr. Winter: I didn't hear.

The Court: Birmingham v. Rucker Breeding Farms. [45] It is a Circuit Court case.

Mr. Fishburne: 152 Federal 2nd 837; 63 Federal Supplement 779.

Mr. Winter: Yes. That is the case cited in there. The Eighth Circuit overruled that. And the Court pointed out that Congress, in defining agricultural labor, used advisedly the language 'service performed in connection with the hatching of poultry.' That is a different section than labor in handling and packing of fruit under 1426-A.

Mr. Fishburne: That is where we consider the government has been completely arbitrary. In connection with hatching poultry it is all right but in handling rhubarb it is a different case entirely. I can't follow the logic of the thing.

The Court: I think I will take a recess for ten minutes.

(Whereupon, at 11:30 o'clock a.m., a recess was had until 11:40 o'clock a.m., May 16, 1949, at which time the following proceedings were had, to-wit:)

The Court: Do you have anything further, Mr. Winter, that you want to suggest or offer to the Court?

Mr. Winter: I just wanted to give your Honor some citations as to bookkeepers and stenographers

which were held non-agricultural. In the Gaylord Guernsey Farms— [46] Federal 2nd——

The Court: What were the facts, briefly?

Mr. Winter: I think, as I recall the case, the Gaylord Guernsey Farms was a farmer or a corporation and they had bookkeepers and stenographers keeping the books and the exemption was granted to all the other employees including those who kept and built fences, but the Court expressly excluded the office operation or service in or about the farm as agricultural labor. In *Ives vs. Larson* it was held that clerical workers and employees who do no manual labor but are of a type having aptitudes quite apart from farm labor were not exempt.

And then there was the Conner case, v. U. S. in 52 Federal Supplement, at 223, a California case, decided by Judge McCulloch, District Judge. It involved taxes. However, between the years 1936 and 1939. The Court said—there were five cases—it quotes Gaylord Guernsey Farms in that.

The Court: That was a case determined before this Social Security Act was passed?

Mr. Winter: I beg your pardon?

The Court: That was a case determined before the Social Security Act was passed?

Mr. Winter: Oh, no. No. No.

The Court: The case was 1939? [47]

Mr. Winter: Yes, but Social Security went into effect in 1936. That was before the last amendment, and that was in 1939, with respect to farms.

The Court: Yes.

Mr. Winter: And the regulations I presume—the statute and regulations were amended. The pertinent part of Section 606, which amended the Social Security—I think I read that subdivision 4, which we contend was in the subdivision, was the “handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations, or, in the case of fruits and vegetables, as an incident the preparation of such fruits and vegetables for market.” “The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.” “As used in this subsection, the term ‘farm’ includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms . . . ” and so on.

Those are all the cases I have, your Honor, on the subject and that is the position of the Commissioner and it has been his position since the amendments.

The Court: Well, the letter introduced in evidence, Mr. Winter, seems to at least leave the inference without too great a stretch of the imagination that the Commissioner was peaved because the Asso-

ciation hadn't responded to his request to bring themselves within the classification by his ruling.

Mr. Winter: That is only, your Honor, with respect to income tax.

The Court: Yes, but, of course, income tax likewise affects the Social Security tax.

Mr. Winter: There is only one section and that is a labor organization or a farmer organization such as the Granges.

The Court: I might have misread the letter but——

Mr. Winter: That is all the Commissioner has reference to. Now, your Honor, if this was a labor organization like the A. F. of L. or like the Grange, which is exempt from all taxation, then we have no question; but in order to claim an exemption they have got to show an exemption and all they have shown is that they are a cooperative marketing organization.

The Court: Then you concede they are exempt from income tax? [49]

Mr. Winter: Yes; that is right.

The Court: And then you concede that in this case, under the proof this morning, they are exempt from income tax?

Mr. Winter: Yes, on the proof they have made here I don't think there is any question about it. They are a cooperative marketing institution and they come exactly within the wording of 101 (12).

The Court: I think, Mr. Winter, I am prepared to make a disposition of this.

Mr. Winter: If your Honor holds that they are agricultural—I am wondering—if you hold they are exempt by 101 (1), I don't think there is any evidence that they are exempt under that Statute and entitled to exemption.

The Court: We have here the question for determination, as I understand it, whether or not this cooperative agricultural association was properly assessed for Social Security Tax upon two of its employees for a period of three years.

The amount involved is small but the principle, of course, is one that is of great importance, not only to the tax payer but to the Government in many other similar cases and it is for that reason that I was desirous of getting clearly in mind just what the issues are. [50]

This question of what constitutes agricultural labor has been troublesome since it was first written into the Act. Not only do you have the responsibility of its administration but the Courts in their determination have to decide what Congress meant. After the original enactment, it was sought to be clarified by the amendment.

There is no dispute now, however, as to the existing law and no dispute as to the facts in light of the record as here made and the facts clearly establish that here is an "organization" set up under the provisions of the laws of the State of Washington on a cooperative basis to deal with a single agricultural product, to-wit, rhubarb.

There might be some argument made as to

whether rhubarb is a fruit or a vegetable, but it certainly is one or the other. Some people might classify it one way and some another way.

The organizational set up is such that it will handle only the growers' products and not the product of anyone on the outside.

The central collection depot is provided where the grower, under the direction of the officers of the cooperative, packs his product to get certain standards, and then it is hauled in from the farms by employees of the cooperative and then shipped to places where it is [51] sold, and then by the buyer, I assume, distributed to the ultimate consumer.

The organization itself is a small membership in the neighborhood of one hundred growers. It is a seasonal operation continuing for a period of about four months in the year.

Aside from its officers, as provided for by its Articles of Incorporation, it has the employees that I have referred to who do the trucking and the hauling and the loading. And then it has the accounting employees. In this case there are two in number and they are working for a salary during this four month period which is involved in this controversy.

Now, when we turn to the law—and I am not going to cite numerous authorities because I haven't had an opportunity to run them down and rarely will you find authorities that have identical facts, and none of those are cited—this case, cited in 152 Federal 837, *Birmingham vs. Rucker Breeding*

Farms, which is a Court of Appeals case from the Eighth Circuit, more nearly fits our situation than any of the other citations; although it isn't squarely in point because the language is not comprehensive in the statutory definition of agricultural laborer. However, turning to that definition found in U.S.C., Title 26, Section 1426, sub-section H of sub-section 4, we have this language that is quite applicable to the problem now before us, and it reads as follows:

“The term agricultural labor includes all services in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market.”

The Government concedes here that everyone who participates in these activities in the time involved is within the exemptions that the Court read excepting the two individuals that I have referred to before, who kept the accounts and wrote the checks and looked after the finances and made the disbursements. It contends that they would not be persons who would be classified as being employed as incident to the preparation of such fruits and vegetables for market and, therefore, would not be exempt from Social Security Tax.

The Act that I have just read, standing alone, might not be sufficient to cover the situation so we refer to Title 26, Section 101, sub-division 1, and sub-division 12. The contention of the Plaintiff is that [53] these office employees fall under sub-division 1, which is a general definition, and the contention of the Government is that they fall under sub-division 12, and if they do fall under sub-division 12, then the Government should prevail here.

I am unable to determine that Congress could possibly have had in mind a distinction such as is sought to be made between this comprehensive language in sub-division 1, "labor—agricultural or horticultural," and sub-division 12.

There is no question at all in the mind of the Court that the record as here made brings this cooperative within the provisions of sub-section 12. But, by being brought within the language of that sub-section, I can not assume that they are excluded from the broader language of sub-section 1, which classifies the following organizations as exempt from taxation under this chapter, as being those that are labor organizations and agricultural or horticultural organizations.

We have here an agricultural organization; or, if you classify rhubarb as a fruit, it is a horticultural organization.

It is a cooperative.

Its function is not a profit making business.

The processing of this rhubarb, under the [54] cooperative's direction, is done on the farm and hauled to a central point and there distributed.

In order that it can function as a cooperative agricultural or horticultural organization, it must of necessity have someone employed to keep books and records.

I doubt that even in this small operation the bookkeeper and the accountant, or whatever their designations are, or whether the employee was actually handling crates of rhubarb, is important. It seems to this Court an absurdity that everybody identified with this farm marketing organization is exempt except those who kept the records and that they should be subject to tax.

I am convinced that the interpretation placed upon the language of the Act—and had there been any regulation that would seem to be contrary to the language of the Act, with all due respect for the Department, I would not feel warranted in following them—but I am convinced that the Internal Revenue Department did not have the full understanding of the operation of this organization, a cooperative association, or they would never have arrived at the conclusion which they did.

I suggested at the outset here, to counsel, that the letter from the Department introduced in evidence seemed to indicate some feeling on the part of some [55] employee of the Internal Revenue Department that because their demands had not been met and their commands had not been obeyed

they arbitrarily proceeded to assess the tax. But the Court was advised that this assessment dealt with income taxes rather than Social Security tax.

I appreciate that anyone who attacks anything concerning Federal taxes has the burden of proving their contention. The rule of construction is one of rather strict construction against the taxpayer, but this Court at any rate feels it is splitting hairs when you attempt to make a distinction between those absolutely essential employees who are engaged in the business of marketing for the members of the cooperative and those persons who keep the records.

I shall, therefore, find for the Plaintiff in the amount prayed for in the Complaint, and I will allow the Defendant—the Government—exceptions.

Mr. Winter: Your Honor, I am wondering, is your Honor finding that this corporation was exempt under Section 101 (1)?

The Court: Yes.

Mr. Winter: Would you make that finding, your Honor?

The Court: I thought I made it clear. It is exempt under 101 (1) and likewise under 101 (12); and [56] neither are exclusive of the other.

101 (1) is comprehensive enough to cover (12) and it is, therefore, exempt under 101 (1).

Mr. Winter: The point I was making is that such an exemption statute is strictly construed and I don't think there is any evidence that they are an association.

The Court: That is what we have been determining all morning.

Mr. Winter: In none of the cases that we have cited has any of those corporations ever been allowed any exemptions under 101 (1).

The Court: Well, this will be one case where they will be, so far as this Court has the responsibility of determining. The Appellate Court may take another view, however.

Mr. Winter: I wanted just to point it out, your Honor.

The Court: In order that you may have it clear, I think when you get a transcript of what I have just said you will find that I bring this within the provisions of 101 (1); that is, that it is an agricultural or horticultural organization; and then we go to the Social Security Tax that I referred to.

Mr. Fishburne: Which is 1426 (4). [57]

The Court: Yes.

Mr. Winter: I wonder if your Honor will make a finding—regulation number or section 402.208 (106) Federal Insurance Contribution Act—the regulation definitely excludes—does your Honor find that the regulation is invalid under the statute? Will your Honor make such a finding?

The Court: I don't know that I am called upon to find that the regulation is invalid. I find that a judicial interpretation of the statute—

Mr. Winter: Will you find as a matter of law that the regulation is invalid?

The Court: I don't think that I need to make that finding.

Mr. Winter: Well, your Honor said you were surprised that the Government would take such a position and it is a regulation since 1940.

The Court: I don't want to hold that the regulation is an invalid regulation. That might color instances where facts were substantially different from facts in this case, and that is the reason it would hardly be proper for a trial court to make such a holding, unless that was the only thing in issue. But, what has been brought to the attention of the Court here is an interpretation of the statutes themselves under the facts of this particular case and as I said at the outset this has always been a troublesome matter, this matter of what constitutes an agricultural worker.

Mr. Winter: We had it in the Colfax—I had two cases taken to the Circuit Court of Appeals, that involved workers in warehouses.

The Court: I wasn't influenced by any past legislative experience but I know how the exemptions got into the statute and the reason for it because it grew out of a situation in my own District.

If that is all now then, Court will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 12:10 o'clock p.m., May 16, 1949, hearing in this cause was completed.) [59]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein set forth.

EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the Motion of the Defendant-Appellant herein and the Order of the United States Court of Appeals for the Ninth Circuit (a copy of which was filed in the United States District Court for the Western District of Washington, Southern Division, on February 6, 1950), wherein the Clerk of the said District Court was directed to file in the said Circuit Court the complete stenographic transcript of the proceedings and testimony at the trial of the above entitled cause in the said District Court on May 16, 1949, I am transmitting herewith the official copy of the Court Reporter's Transcript of the Proceedings and Testimony at the trial of the above entitled cause

in the said District Court on May 16, 1949, and filed by the said Court Reporter in the office of the Clerk of the said District Court under date of December 28, 1949 as his official copy of the Transcript of the Records of the Proceedings and Testimony as aforementioned, and I do further certify that the said Transcript (consisting of pages numbered 1 to 60 inclusive) constitutes the Supplemental Record on Appeal in the above entitled cause.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, Western District of Washington, this 8th day of February, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12406. United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue, Appellant, vs. Sumner Rhubarb Growers' Association, a Cooperative Agricultural Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed February 13, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE,
APPELLANT

v.

SUMNER RHUBARB GROWERS' ASSOCIATION, A COOPERATIVE
AGRICULTURAL CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLANT

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APR 3 1950

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	3
Statutes and Regulations Involved	3
Statement	3
Statement of Points to be Urged	6
Summary of Argument	7

Argument:

The taxpayer is not entitled to exemption from the employment tax here involved	10
A. The taxpayer is not an "agricultural" or horticultural" organization within the meaning of Section 101(1) of the Internal Revenue Code and as such exempt under Section 1426(b)(10)(B) of the Code, as amended, from payment of the employment tax imposed under Section 1410, as amended	12
B. The record does not establish that the taxpayer was exempt from income tax under Section 101(12) of the Code, or that the services in question were exempt under Section 1426(b)(10)(A)	15
C. The services here involved did not constitute "agricultural labor" within the meaning of the statute and therefore were not exempt from the employment tax involved	17

Conclusion	23
Appendix	24

CITATIONS

Cases:

<i>Baiocchi v. Ewing</i> , 87 F. Supp. 520	22
<i>Birmingham v. Rucker's Breeding Farm</i> , 152 F. 2d 837	20
<i>Commissioner v. Shoong</i> , 177 F. 2d 131	14
<i>Farmers Union State Exchange v. Commissioner</i> , 30 B.T.A. 1051	13
<i>Jones v. Gaylord Guernsey Farms</i> , 128 F. 2d 1008	20
<i>Lake Region Packing Ass'n v. United States</i> , 146 F. 2d 157	20, 21
<i>Larson v. Ives Dairy Co.</i> , 154 F. 2d 701	21
<i>Latimer v. United States</i> , 52 F. Supp. 228	20, 21
<i>Miller v. Bettencourt</i> , 161 F. 2d 995	22
<i>Miller v. Burger</i> , 161 F. 2d 992	22
<i>North Whittier Heights C. Ass'n v. National L. R. Board</i> , 109 F. 2d 77, certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724	19

Cases—Continued

Page

<i>Portland Co-operative Labor Temple Ass'n v. Commissioner</i> , 39 B.T.A. 450	13
<i>United States v. Navar</i> , 158 F. 2d 91	20
<i>United States v. Turner Turpentine Co.</i> , 111 F. 2d 400	20
<i>Wilson, Lee & Co. v. United States</i> , 171 F. 2d 503	20

Statutes:

Income Tax Act of 1913, c. 16, 38 Stat. 114, Sec. II G	13
--	----

Internal Revenue Code:

Sec. 101 (26 U.S.C. 1946 ed., Sec. 101)	24
Sec. 1400 (26 U.S.C. 1946 ed., Sec. 1400)	11
Sec. 1410 (26 U.S.C. 1946 ed., Sec. 1410)	25
Sec. 1426 (26 U.S.C. 1946 ed., Sec. 1426)	25
Sec. 1432 (26 U.S.C. 1946 ed., Sec. 1432)	28
Sec. 1607 (26 U.S.C. 1946 ed., Sec. 1607)	19
Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 11	13
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 103	15

Social Security Act, c. 531, 49 Stat. 620:

Sec. 209 (42 U.S.C. 1946 ed., Sec. 409)	20
Sec. 811 (42 U.S.C. 1946 ed., Sec. 1011)	11

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

Sec. 201 (42 U.S.C. 1946 ed., Sec. 409)	20
Sec. 606 (26 U.S.C. 1946 ed., Sec. 1426)	3, 6, 20
Sec. 614 (26 U.S.C. 1946 ed., Sec. 1607)	19

Miscellaneous:

A.R.M. 79, 3 Cum. Bull. 235 (1920)	13
61 Cong. Record, Part 6, pp. 5957-5959	13
I.T. 2325, V-2 Cum. Bull. 63 (1926)	13
Mim. 6046, 1946-2 Cum. Bull. 147	20
Mim. 6056, 1946-2 Cum. Bull. 148	20
Mim. 6086, 1946-2 Cum. Bull. 150	20
O.D. 523, 2 Cum. Bull. 211 (1920)	13
Seidman's Legislative History of Federal Income Tax Laws, pp. 855-859	13
S. Rep. No. 734, 76th Cong., 1st Sess., p. 64 (1939-2 Cum. Bull. 565)	21
S.M. 2558, III-2 Cum. Bull. 207 (1924)	13

Treasury Regulations 106:

Sec. 402.203	29
Sec. 402.206	30
Sec. 402.207	19, 30
Sec. 402.208	19, 31

Treasury Regulations 111, Sec. 209.101 (1)-1	13, 14, 28
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,406

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE,
APPELLANT

v.

SUMNER RHUBARB GROWERS' ASSOCIATION, A COOPERATIVE
AGRICULTURAL CORPORATION, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON*

BRIEF FOR THE APPELLANT

OPINION BELOW

The Findings of Fact and Conclusions of Law (R. 34-38) and oral opinion of the court below (R. 27-33) have not been officially reported.

JURISDICTION

This is a suit by Sumner Rhubarb Growers' Association, a cooperative agricultural corporation organized under the laws of the State of Washington (herein referred to as the taxpayer), against the Collector of Internal Revenue for the collection district of Washington, to recover amounts aggregating \$89.14 paid by the taxpayer as employment taxes under the Federal

Insurance Contributions Act¹ for periods beginning October 1, 1942, and ending June 30, 1946. (R. 2-6.) The complaint was filed in the District Court of the United States for the Western District of Washington on August 13, 1948, within the time provided by Section 3772 of the Internal Revenue Code. (R. 21.) The suit is based upon five separate claims for refund aggregating \$366.03 for the respective periods involved (R. 7-21, 25) which were duly and timely filed with the Collector of Internal Revenue on November 18, 1946 (R. 5, 25, 37), more than six months prior to the commencement of this action. By a letter dated June 24, 1948 (R. 5, 25, 37), the Commissioner of Internal Revenue notified the taxpayer of his rejection of its claim for refund of \$25.08 for the period from January 1, 1946, to June 30, 1946 (being the latest tax period involved), and by another letter of the same date (R. 44-48) the Commissioner advised the taxpayer that its remaining claims for refund would be adjusted in accordance with his ruling therein as to its liability for the employment taxes therein involved.² Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code, as amended. The cause was tried to the court below on May 16, 1949 (R. 26), at which time the court announced, in an oral opinion (R. 27-33, 97-104), its decision in favor of the taxpayer. The findings of fact, conclusions of law, and judgment of the court below were entered June 29, 1949. (R. 34-40.) The notice of appeal was filed August 25, 1949. (R. 41.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

¹ Internal Revenue Code, Secs. 1400-1432, as amended.

² While the record indicates that no refunds had been made to the taxpayer at the time the suit was brought (R. 5-6, 25, 37), the parties apparently have proceeded on the assumption that the ruling in question contemplated refund of all of the taxes claimed except the \$89.14 sued for in this action.

QUESTIONS PRESENTED

Whether the taxpayer was exempt under Section 1426 (b) of the Internal Revenue Code, as amended, from the employment tax here involved, imposed under Section 1410 of the Code, as amended:

1. Because it was exempt under Section 101 (1) of the Code from federal income tax;

2. Because it was exempt under Section 101 (12) of the Code from federal income tax; or

3. Because the services of its employees with respect to which the tax involved was imposed constituted "agricultural labor" within the meaning of Section 1426 (h) of the Code, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code and Treasury Regulations 111 promulgated thereunder are printed in the Appendix, *infra*.

STATEMENT

The taxpayer is a cooperative agricultural corporation organized under the laws of the State of Washington. The purposes for which the corporation was organized are to pack, process, can, store, warehouse, handle and market fruit, vegetables, rhubarb, and other agricultural and horticultural products, grown in the State of Washington, and to buy, process, pack, handle and sell all kinds of agricultural and horticultural products, both for its own account and on commission for others, and to contract accordingly, and operate warehouses, canneries, cold storage plants, packing houses, wherever necessary or expedient in the carrying on of the business. The primary purpose for the organization of the taxpayer was to handle the agricultural and horticultural products of its members upon

a cooperative basis, and to handle all of such products of members who signed the standard marketing agreement of the taxpayer upon the basis of actual cost to the taxpayer, and an amount apportioned over the entire operations of any one season. (R. 34-35.)

During the periods here involved the taxpayer was engaged in Sumner, Washington, in warehousing, packing and selling rhubarb grown by its farmer members in the Sumner Valley. All of the rhubarb handled by the taxpayer was grown on the farms of members of the association, and practically all of the rhubarb sold was shipped from packing on the farm where it was grown. The rest of the rhubarb which the taxpayer handled during the periods in question was packed at the taxpayer's warehouse in Sumner, Washington. All of the rhubarb, after being packed, was shipped from the taxpayer's rented warehouse. (R. 35.)

The operations of the taxpayer during the periods covered by the claims for refund involved in this proceeding were seasonal, extending from January to the middle of May of each year. (R. 36.)

In the year 1931 the Commissioner of Internal Revenue ruled that the taxpayer was exempt under Section 103(12) of the Revenue Act of 1928, c. 852, 45 Stat. 791, from payment of the income tax imposed under that Act. (R. 36.) In its complaint the taxpayer alleged (R. 4), and the court below found (R. 36), that the taxpayer had maintained that exempt status during the period from October 1, 1942, to June 30, 1946, the period for which the employment taxes here involved were paid. The exemption provision in question is now incorporated in Section 101(12) of the Internal Revenue Code, and, while the taxpayer's right to recover the employment taxes here involved does not necessarily depend upon whether the taxpayer is exempt under this provision from the payment of income taxes, it is to be

noted that under date of March 12, 1948, the Commissioner of Internal Revenue revoked his earlier ruling of exemption effective January 1, 1939, the effective date of the Internal Revenue Code, for failure of the taxpayer to furnish proof of its exempt status under the Code. (R. 45-46.)

For stated periods between October 1, 1942, and June 30, 1946, the taxpayer paid employment taxes aggregating \$366.03 under Section 1410 of the Internal Revenue Code, as amended, with respect to having persons in its employ, in the amounts and on the dates set out in the findings of the court below. (R. 36-37.) Thereafter the taxpayer duly and timely filed a claim for refund of such employment taxes for each of the five periods involved. (R. 7-21, 37.) Each of these claims for refund was based upon the grounds (1) that the taxpayer was exempt under Section 101(1) of the Internal Revenue Code from the payment of income tax and therefore exempt from the payment of any employment tax, and (2) that the employment with respect to which the taxes were paid was "agricultural labor" within the meaning of applicable provisions of the law and therefore exempt from the employment tax. (R. 7-21.)

By a letter dated June 24, 1948 (R. 25), the Commissioner disallowed the claim for refund (R. 19-21) of the taxes paid for the period January 1, 1946, to June 30, 1946, and advised the taxpayer that its remaining claims would be adjusted in accordance with a ruling contained in another letter (R. 44-48) to the taxpayer of the same date. This latter letter ruled that the taxpayer was not an agricultural or horticultural organization within the meaning of Section 101(1) of the Internal Revenue Code, and not thereby exempt under Section 1426-(b)(10)(B) of the Code, as amended, from the payment of employment taxes. The Commissioner further held

that since the taxpayer had failed to submit evidence that it was entitled to exemption from income under Section 101(12) of the Code, the adjustment of the claims filed by it could be based only on the extent to which the services performed for the taxpayer by the individuals involved were excepted as "agricultural labor" in accordance with Section 1426(h)(4) of the Code, as amended, and proceeded to classify such services as were excepted as "agricultural labor" under his ruling and those which constituted employment with respect to which the taxpayer was held to be subject to the employment tax. (R. 44-48.)

On the basis of this ruling as to what services performed for the taxpayer constituted "agricultural labor" and what services constituted "employment" for purposes of the employment tax the taxpayer brought this suit for refund of only \$89.14 as the amount which still would be due it on the basis of this ruling. (R. 5-6.)

Without definitely passing upon the question whether the services performed for the taxpayer which the Commissioner classified "employment" with respect to which the employment tax had been properly paid, or constituted "agricultural labor" excepted from the tax, the court below concluded as a matter of law (R. 38) that the taxpayer was exempt under Section 101(1)³ and (12) of the Code and entered judgment for the taxpayer (R. 39). This appeal is taken from that judgment. (R. 41.)

STATEMENT OF POINTS TO BE URGED

The Collector of Internal Revenue relies upon the following errors as a basis for this appeal (R. 52-53) :

1. The court below erred in concluding that the taxpayer's employees were exempt from the federal social

³ The reference to Section 10(1) in the court's conclusions of law (R. 38) clearly was an error.

security tax under Section 101(1) and (12) of the Internal Revenue Code, or either of these sections.

2. The court below erred in finding that the taxpayer maintained a tax exempt status during the tax period from October 1, 1942, to June 30, 1946, involved in this action, or any portion of that period, and that it was entitled to a tax refund.

3. The court below erred in holding that the services performed for the taxpayer did not constitute employment under Section 1426(b)(10)(A) and (B) of the Internal Revenue Code.

4. The court below erred in failing to hold that the services performed for the taxpayer constituted employment under Section 1426(b) of the Internal Revenue Code, and were not exempt under subsections (b)(1) and (h) of that section.

5. The court below erred in entering judgment for the taxpayer.

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act, among other things, imposes an excise tax, in addition to other taxes, upon every employer with respect to having individuals in his employ, equal to a stated percentage of the wages paid for such services. Exemptions from the tax is accomplished in certain cases by excluding from the statutory definition of "employment" with respect to which the tax is levied certain enumerated classes of services performed by an employee for his employer. Among the excluded services specifically enumerated are "agricultural labor" as defined in the Code, service performed in the employ of an "agricultural" or "horticultural" organization exempt under Section 101(1) of the Code from payment of the income tax, and service performed in the employ of a corporation

exempt under Section 101 of the Code if (1) the remuneration for service performed in any one quarter does not exceed \$45, (2) the service is in connection with the collection of dues for a fraternal beneficiary society, order, etc., away from the home office, or (3) is performed by a student of a school, college, or university. Section 1426(b)(1) and (10)(A) and (B) of the Code, as amended.

The taxpayer is not an exempt corporation within the meaning of Section 101(1) of the Code. That provision, first included in the Income Tax Act of 1913, exempts from income and other taxes imposed by Chapter 1 of the Code any "labor," "agricultural," or "horticultural" organization. The legislative history, Treasury Regulations, and decisions relating to this provision clearly indicate that the exemption granted by this section is limited to those organizations which have no income inuring to the benefit of any member, are educational or instructive, and have as their objects the betterment of the conditions of those engaged in the named pursuits, the improvement of their products and the development of greater efficiency in their occupations.

The record shows that this taxpayer is a corporation organized and operated on a cooperative basis strictly as a marketing agency for the benefit of farmer members. It is not an "agricultural" or "horticultural" organization such as would be exempt from income tax under Section 101(1) of the Internal Revenue Code. Hence it is not exempt from liability for the employment tax with respect to the services rendered by its employees on that ground.

On the record, this taxpayer, if it is exempt from the income tax at all, would be exempt under Section 101(12) of the Code as a farmers', fruit growers', or like cooperative association.

While it might be questioned whether the taxpayer has proved all facts to establish income tax exemption under Section 101(12), that may be assumed because such exemption does not necessarily carry with it exemption from all employment tax. Hence, to establish exemption from the tax here involved the burden was upon the taxpayer to prove that the employment on which the disputed tax here involved constituted "agricultural labor" within the meaning of the statute.

Services rendered by an employee for any organization exempt from income tax by Section 101 of the Code (except Section 101(1)) are not subject to the employment tax if the remuneration for such services in any one quarter did not exceed \$45, or if such services were rendered by a student enrolled and regularly attending classes at a school, college, or university, etc. Section 101(12) of the Code grants a limited exemption from income tax to farmers' and fruit growers' cooperative associations. The Commissioner of Internal Revenue previously had granted the taxpayer exemption under the corresponding provision of the Revenue Act of 1928, but prior to institution of the present action he revoked that exemption as of January 1, 1939 (effective date of the Internal Revenue Code) because of the taxpayer's failure to submit the information requested in support of its exempt status. While the taxpayer has proved that it is a cooperative marketing association operated exclusively for the benefit of its farmer members, it is not clear that it met all of the conditions for exemption under Section 101(12) during the periods involved. But even if its exempt status under this section be assumed, it still has failed to show that the services upon which the disputed tax was based were exempt under Section 1426(b)(10)(A) of the Code.

Finally, the services performed for the taxpayer by its employees with respect to which the disputed em-

ployment tax here involved was paid were not exempt from the tax as “agricultural labor” as defined in Section 1426(h) of the Code.

The Commissioner of Internal Revenue has ruled that the services performed by most of the taxpayer’s employees during the tax periods involved constituted “agricultural labor” within the meaning of the statute. But under the facts and the law he properly ruled that the administrative and clerical services performed by the taxpayer’s manager, bookkeeper, secretary and office clerk did not constitute “agricultural labor” within the meaning of the statute and, therefore, are subject to the employment tax. Accordingly, the decision of the court below should be reversed.

ARGUMENT

The Taxpayer Is Not Entitled to Exemption from the Employment Tax Here Involved

Exemption from the employment tax is accomplished in certain cases by excluding from the above definition a number of specific classes of services rendered by an employee for his employer. The provisions necessary to consider in determining the issues here involved are Section 1426(b)(1) of the Code, which excludes “agricultural labor” as defined in Section 1426(h); Section 1426(b)(10)(A), which excludes services performed in any calendar quarter in the employ of an organization exempt from income tax under Section 101 of the Code if “(i) the remuneration for such service does not exceed \$45, or * * * (iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university”; and Section 1426(b)(10)(B), which excludes service performed in the employ of an “agricultural” or “horticultural”

organization exempt from income tax under Section 101(1) of the Code (all sections in Appendix, *infra*).

Section 1410 of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939 (Appendix, *infra*), provides that in addition to other taxes, every employer shall pay an excise tax, commonly referred to as social security tax, with respect to having individuals in his employ,⁴ equal to certain stated percentages of the "wages", as defined, paid with respect to "employment", as defined, after the effective date of the tax. To effect the tax coverage intended by the Code the terms "wages" and "employment", among others, are defined at length. With respect to the years here involved, Section 1426(a) of the Code, as amended (Appendix, *infra*), defines the term "wages" to mean "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash", with certain enumerated exceptions not material here.⁵ The term "employment" is defined, so far as material here, in Section 1426(b) of the Code, as amended, to mean any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, within the United States, with many enumerated exceptions, two of which are important here.

⁴ A similar "social security tax" is imposed by Section 1400 of the Internal Revenue Code, as amended, upon income received by individuals equal to stated percentages of "wages" received with respect to "employment" as defined by the Code.

⁵ For definition of the terms "wages" and "employment" as applicable prior to January 1, 1940, see Section 811 of the Social Security Act, c. 531, 49 Stat. 620, 639, as amended, and Section 1426 of the Internal Revenue Code, effective April 1, 1939.

A. *The taxpayer is not an "agricultural" or "horticultural" organization within the meaning of Section 101 (1) of the Internal Revenue Code and as such exempt under Section 1426 (b) (10) (B) of the Code, as amended, from payment of the employment tax imposed under Section 1410, as amended*

Section 1426 (b) (10) (B) of the Code, as amended, upon which the court below seems to have principally relied in rendering its decision,⁶ provides that "employment", as defined in subsection (b), shall not include "Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1)" of the Code (Appendix, *infra*). Thus, if the taxpayer is an "agricultural" or "horticultural" organization within the meaning of the latter section it is exempt from payment of the employment tax with respect to remuneration paid to any of its employees for services rendered, regardless of the nature of those services. We submit there is no basis in the record for holding the taxpayer exempt under these provisions.

Section 101 exempts from the taxes imposed by Chapter 1 of the Code many enumerated organizations. Paragraph (1) of that section exempts "labor", "agricultural", and "horticultural" organizations. This exemption has been included in our income tax statutes

⁶ While the court below concluded as a matter of law (R. 38) that the taxpayer's "employees" were exempt from social security tax, the question at issue was the taxpayer's liability for the taxes involved. However, it appears from the discussion at the hearing (R. 89-90), and the court's oral opinion (R. 27-33, 97-104), that the court ruled the taxpayer to be an exempt corporation within the meaning of Section 101(1) and (12) of the Code for the periods involved. The court made no reference to the limited exemption from tax under Section 1426(b) (10) (A), and made no direct ruling with respect to the question whether the services performed by the taxpayer's employees upon which the controverted tax was based constituted "agricultural labor" within the meaning of the Code.

since the beginning.⁷ The applicable Treasury Regulations consistently have defined the organizations covered by this subsection as those which have no income inuring to the benefit of any member, are educational or instructive, and have as their objects the betterment of the conditions of those engaged in the named pursuits, the improvement of their products and the development of greater efficiency in their occupations.⁸ That the regulations are in accord with Congressional intent is made clear by the debate on the floor of the Senate in connection with the Revenue Act of 1921⁹ when the language of this particular provision was last considered by Congress. 61 Cong. Record, Part 6, pp. 5957-5959. See, also, Seidman's Legislative History of Federal Income Tax Laws, pp. 855-859.

In addition to the specific exemption of "labor", "agricultural", and "horticultural" organizations from federal income taxation Congress has uniformly included a provision exempting, with certain limitations, from income taxation farmers', fruit growers', and like associations organized on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or which were organized

⁷ See Income Tax Act of 1913, c. 16, 38 Stat. 114, 172, Sec. II G(a); Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 11(a); and corresponding provisions of succeeding Revenue Acts.

⁸ See Treasury Regulations 111, Sec. 29.101(1)-1 (Appendix, *infra*), and the corresponding provisions of Regulations issued under the earlier Revenue Acts. See, also, *Farmers Union State Exchange v. Commissioner*, 30 B.T.A. 1051; *Portland Co-operative Labor Temple Ass'n v. Commissioner*, 39 B.T.A. 450; S.M. 2558, III-2 Cum. Bull. 207 (1924); I.T. 2325, V-2 Cum. Bull. 63 (1926). Compare O.D. 523, 2 Cum. Bull. 211 (1920); A.R.M. 79, 3 Cum. Bull. 235 (1920).

⁹ C. 136, 42 Stat. 227.

and operated for the purpose of purchasing supplies or equipment for the use of members or other persons and turning over such supplies and equipment to them at cost, plus necessary expenses.¹⁰

It long has been settled that deductions from income or exemptions from tax are granted only as a matter of legislative grace, and that the burden is upon the person claiming such deduction or exemption to bring himself within the statutory provisions authorizing it.¹¹ *Commissioner v. Shoong*, 177 F. 2d 131 (C. A. 9th), and cases cited. Exemption depends upon the facts of the particular case.

It is clear from the record here that this taxpayer was not exempt under Section 101 (1) from income tax. It was organized in 1930 (R. 72) for the purposes set out in the findings below (R. 34). During the periods here involved it was engaged in warehousing, packing and selling rhubarb grown by its farmer members. All of the rhubarb handled by it was grown on farms of members and practically all of the rhubarb sold was shipped from packing on the farm where it was grown. The rest of the rhubarb handled by it was packed by the taxpayer at and shipped from its warehouse. (R. 35.) Its dealings with its members are described by the witness Goettsch, the taxpayer's manager. (R. 65-84.) The members paid a membership fee of \$1 and signed a marketing agreement under which he had to sell his rhubarb through the association. (R. 78-79.) The taxpayer markets the product and pays the grower the amount of the sale price less 20 cents a

¹⁰ Section 101(12) of the Internal Revenue Code (Appendix, *infra*), and corresponding provisions of earlier Revenue Acts.

¹¹ The nature of evidence to establish tax exemption to the satisfaction of the Commissioner under Section 101 of the Code is indicated by Section 29.101-1 of Treasury Regulations 111 and corresponding provisions of Regulations issued under the earlier Revenue Acts.

box, which is retained to cover expenses of operation. Any amount left unused at the end of the season is distributed to members on the basis of the number of boxes sold to the association. (R. 79-81.) The taxpayer also purchases and sells supplies to its members at cost. (R. 79.)

The provisions of Section 101 (1) and (12) are mutually exclusive. Regardless of the opinion expressed by the court below (R. 32, 89-90), we know of no authority to the contrary. The very language of paragraph (12) and other specific exemption provisions of Section 101 make it abundantly clear that Congress never intended to include corporations of the character here involved within the provisions of Section 101 (1). We submit the court erred under the facts and the law in holding taxpayer to be an exempt corporation within the meaning of Section 101 (1) of the Internal Revenue Code.

B. The record does not establish that the taxpayer was exempt from income tax under Section 101 (12) of the Code, or that the services in question were exempt under Section 1426 (b) (10) (A)

As stated above, the taxpayer was organized in 1930 (R. 72) for the purposes set out in the findings below (R. 34). Clearly it was organized and operated during the periods here involved exclusively as a cooperative marketing association for the benefit of its farmer members. In 1931 the Commissioner ruled that the taxpayer was exempt from income tax under Section 103 (12) of the Revenue Act of 1928. (R. 36, 45.)¹² He revoked the taxpayer's exemption under that section as of January 1, 1939 (effective date of the Internal

¹² C. 852, 45 Stat. 791.

Revenue Code), for failure to submit evidence of its exempt status under the Code.

The exemption from income tax accorded by Section 101 (12) in the case of farmers' and fruit growers' co-operative associations is limited. Exemption depends both upon the purposes for which it was organized and the method of its operation. Whether an association is exempt for any particular taxable period is a question of fact. For instance, exemption will not be denied because the association has capital stock, provided the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the state of incorporation or eight percent per annum, whichever is greater, on the value of the consideration for which the stock was issued. Nor will exemption be denied such association because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose. But these and other conditions of the statute are questions of fact, and the burden of proof being what it is in cases where taxpayers are claiming exemption from tax it cannot be said that the record here adequately establishes the taxpayer's exempt status under Section 101 (12) for the tax periods involved.

However, assuming that the taxpayer was exempt from income tax under Section 101 (12) for the periods involved, there is no evidence in the record to show that the remuneration paid the taxpayer's employees with respect to which the tax here in controversy was collected is exempt from employment tax under Section 1426 (b) (10) (A), which, so far as material here, applies only if the remuneration for service performed in any one quarter does not exceed \$45, or if such service is performed by a student enrolled and regularly attending classes at a school, college or university. The

contrary appears to be true.¹³ Accordingly, it cannot be held that the taxpayer is exempt from the employment taxes here involved by reason of any claimed exemption from income tax under Section 101 (12) of the Code.

C. The services here involved did not constitute "agricultural labor" within the meaning of the statute and therefore were not exempt from the employment tax involved

The only other provision of the statute under which the taxpayer can claim exemption from the employment tax here involved is Section 1426 (b) (1) of the Code, which exempts "agricultural labor" as that term is defined in Section 1426 (h).

Paragraph (1) of Section 1426(h) defines "agricultural labor" for the purposes of the statute to include all services performed on a farm "in connection with" cultivating the soil, or "in connection with" raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife. Paragraph (2) defines the term to include all services performed in the employ of the owner or tenant or other operator of a farm, "in connection with" the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such services are performed on a farm. Paragraph (3) includes in the term

¹³ That a corporation exempt from income tax under Section 101(12) is still subject to social security tax was called to the attention of the court and counsel for the taxpayer at the hearing (R. 57), thus permitting proof of exemption under Section 1426(b) (10) (A) if such were the case.

all services performed “in connection with” the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in Section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

When the nature of the services here involved is considered it will be clear that such services could not be classed as “agricultural labor” within the above definitions. Accordingly, the only definition of “agricultural labor” upon which the taxpayer can rely is paragraph (4) of Section 1426(h) which includes in the definition all services performed—

In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed *as an incident to ordinary farming operations* or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable to services performed in connection with commercial canning or commercial freezing *or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.* (Italics supplied.)

In adjusting the taxpayer’s refund claims the Commissioner held that the services of all but four of the taxpayer’s employees constituted “agricultural labor” within the meaning of Section 1426(h) of the Code.

He found that about fifty per cent of the time of the taxpayer's manager was devoted to agricultural labor and the other half to the administrative functions of the association; that twenty-five per cent, or less, of the time of its bookkeeper was devoted to what he considered agricultural labor; and that its secretary and its office clerk devoted no time to such labor. He therefore held that the wages paid to these four employees was subject to the employment tax. (R. 44-48.)¹⁴

We submit the administrative and clerical services rendered by these four employees do not constitute "agricultural labor" within the meaning of the statute and the applicable Treasury Regulations issued thereunder.¹⁵

As this Court pointed out in *North Whittier Heights C. Ass'n v. National L. R. Board*, 109 F. 2d 77, 79, certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724, involving the definition of "agricultural laborers" under the National Labor Relations Act, pursuit of definitions of the term through the cases leads to confusion because generally the case definitions have grown out of special statutory phraseology or out of judicial effort to conform to legislative intent.

The Social Security Act Amendments of 1939, which (by Section 606) amended Section 1426 of the Internal Revenue Code to include the definition of "agricultural labor" here under consideration, further (by Section 614) amended Section 1607(1) of the Code to include

¹⁴ The Commissioner's allocation of the services of the manager and the bookkeeper has not been questioned and seems to be supported by the evidence. (R. 65-89.) Accordingly, if such administrative and clerical services are held not to constitute "agricultural labor" within the meaning of the Act, all of the wages paid these four employees are subject to the tax. See Section 1426(c) of the Code and Section 402.407 of Treasury Regulations 106. (Appendix, *infra*.)

¹⁵ See Treasury Regulations 106, Section 402.208 (Appendix, *infra*).

the identical definition of "agricultural labor" for purposes of the excise tax imposed on employers of eight or more persons, and also (by Section 201) amended the Social Security Act of 1935, c. 531, 49 Stat. 620, to include as Section 209(1) thereof, as amended, the identical definition of "agricultural labor" for purposes of the old age and survivors' insurance benefits provided under that Act. There have been decisions¹⁶ and Internal Revenue Bureau rulings¹⁷ holding that labor performed in certain situations constituted "agricultural labor" within the meaning of the statute and the regulations. There also are decisions dealing with the definition of "agricultural labor" for the purposes of these statutes prior to the 1939 amendments which, while not definitely in point, may be helpful. See *United States v. Turner Turpentine Co.*, 111 F. 2d 400 (C. A. 5th); *Jones v. Gaylord Guernsey Farms*, 128 F. 2d 1008 (C. A. 10th); *Latimer v. United States*, 52 F. Supp. 228 (S. D. Cal.), and others. But none of the decisions has gone so far as to hold that administrative and clerical services, such as the services here involved, performed for a cooperative or other organization not engaged in any agricultural pursuit, constituted labor performed "as an incident to ordinary farming operations" within the meaning of Section 1426(h) of the statute and Section 402.208 of Regulations 106. As pointed out in the foregoing section of the Regulations, since the excepted services as defined in the statute must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to car-

¹⁶ e.g. *Lake Region Packing Ass'n v. United States*, 146 F. 2d 157 (C.A. 5th); *Birmingham v. Rucker's Breeding Farm*, 152 F. 2d 837 (C.A. 8th); *United States v. Navar*, 158 F. 2d 91 (C.A. 5th); *Lee Wilson & Co. v. United States*, 171 F. 2d 503 (C.A. 8th).

¹⁷ Mim. 6046, 1946-2 Cum. Bull. 147; Mim. 6056 1946-2 Cum. Bull. 148; Mim. 6086, 1946-2 Cum. Bull. 150.

rier for transportation to market, of the commodity, such excepted services do not include services performed "as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities," unless the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm. That this construction was the intent of Congress is made clear by the report of the Senate Committee on Finance in connection with the Social Security Act Amendments of 1939. S. Rep. No. 734, 76th Cong., 1st Sess., p. 64 (1939-2 Cum. Bull. 565-581).

In *Lake Region Packing Ass'n v. United States*, 146 F. 2d 157 (C. A. 5th), it was held (for years before the 1939 amendments) that labor performed by employees of a cooperative packing association not performed in the field or in connection with getting fruit from field to the place of processing was not agricultural labor. And in *United States v. Turner Turpentine Co.*, *supra*, p. 404, the same court held that the 1939 amendments defining "agricultural labor" in detail are to be deemed interpretative and explanatory of the term as used in the earlier acts. In *Jones v. Gaylord Guernsey Farms*, *supra*, the court held that the services of a bookkeeper and a stenographer performed in connection with a farm (before the 1939 amendments) did not constitute agricultural labor. In *Larson v. Ives Dairy Co.*, 154 F. 2d 701 (C. A. 5th), the court held that services performed for a dairy (before the 1939 amendments) by its office help and sales solicitor were not agricultural labor. In *Latimer v. United States*, 52 F. Supp. 228 (S. D. Cal.), the court held that services similar to those here involved (also before the 1939 amendments), or even more closely related to the farm-

ing operations of the cooperative's members, did not constitute agricultural labor.

Of equal importance here are the recent decisions of this Court in *Miller v. Burger*, 161 F. 2d 992, and *Miller v. Bettencourt*, 161 F. 2d 995, which involve construction of this definition in connection with old age and survivors' insurance coverage of the Social Security Act. While the employer in those cases was not a cooperative association as here, this Court's opinions make clear the limitation upon what constitutes "agricultural labor" for purposes of the Act and were made the basis of the decision of the District Court for the Northern District of California in *Baiocchi v. Ewing*, 87 F. Supp. 520, wherein it was held that, for purposes of Social Security Act coverage, services more intimately related to farming operations than to those here involved, performed for an agricultural cooperative association, did not constitute "agricultural labor" within the meaning of the statute.

This taxpayer is a cooperative marketing association organized and operated for the benefit of its farmer members. It is not engaged in any farming operations on its own account. The administrative and clerical services of its manager, bookkeeper, secretary and office clerk were not services, "performed as an incident to ordinary farming operations" within the meaning of Section 1426(h) of the Internal Revenue Code, as amended, and should not be exempt from employment tax under the Federal Insurance Contributions Act.

CONCLUSION

The decision of the court below is wrong. It is contrary to the facts and the law and should be reversed and remanded to the court below with directions to dismiss the complaint.

Respectfully submitted,

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APRIL, 1950.

APPENDIX

Internal Revenue Code:

SEC. 101 EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter—

(1) Labor, agricultural, or horticultural organizations;

* * *

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than non-voting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for

members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under this paragraph;

* * *

(26 U.S.C. 1946 ed., Sec. 101.)

SEC. 1410 [as amended by Sec. 604 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426(a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

* * *

(26 U.S.C. 1946 ed., Sec. 1410.)

SEC. 1426 [as amended by Sec. 606 of the Social Security Act Amendments of 1939, *supra*]. DEFINITIONS.

When used in this subchapter—

(a) *Wages*.—The term “wages” means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

* * *

(b) *Employment*.—the term “employment” means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever

nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

(1) Agricultural labor (as defined in subsection (h) of this section) ;

* * *

(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—

(i) the remuneration for such service does not exceed \$45, or

(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university ;

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1) ;

* * *

(c) *Included and Excluded Service.*—If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment ; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not

constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection the term “pay period” means a period (of not more than thirty-one consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by paragraph (9) of subsection (b).

* * *

(h) *Agricultural Labor*.—The term “agricultural labor” includes all services performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used

exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (26 U.S.C. 1946 ed., Sec. 1426.)

SEC. 1432 [as added by Sec. 607 of the Social Security Act amendments of 1939, *supra*]. This subchapter may be cited as the "Federal Insurance Contributions Act."

(26 U.S.C. 1946 ed., Sec. 1432.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.101(1)—1. *Labor, Agricultural, and Horticultural Organizations*.—The organizations contemplated by section 101(1) as entitled to exemption from income taxation are those which—

(1) Have no net income inuring to the benefit of any member;

(2) Are educational or instructive in character; and

(3) have as their object the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations.

Organizations such as county fairs and like associations of a quasi public character, which are designed to encourage the development of better agricultural and horticultural products through a system of awards, and whose income from gate receipts, entry fees, and donations is used exclusively to meet the necessary expenses of upkeep and operation, are thus exempt. On the other hand, associations which have for their purpose, for example, the holding of periodical race meets, the profits from which may inure to the benefit of their shareholders, are not exempt. Similarly, corporations engaged in growing agricultural or horticultural products for profit are not exempt from tax.

Treasury Regulations 106, promulgated under the Internal Revenue Code:

SEC. 402.203 [amended by T. D. 5519, 1946-2 Cum. Bull. 139] *Employment after December 31, 1939.*—(a) *In general.*—Whether services performed on or after January 1, 1940, constitute employment is determined under section 1426(b) of the Act, that is, section 1426(b), as amended, effective January 1, 1940, by section 606 of the Social Security Act Amendments of 1939. This section of these regulations, and sections 402.204 and 402.205 (relating to who are employees and employers), section 402.206 (relating to excepted services in general), section 402.207 (relating to included and excluded services), and sections 402.208 to 402.226, inclusive (relating to the several classes of excepted services), apply with respect only to services performed on or after January 1, 1940.

(b) *Services performed within the United States.*—Services performed on or after January 1, 1940, within the United States, that is, within any of the several States, the District of Columbia, or the Territory of Alaska or Hawaii, by an employee for the person employing him, unless specifically excepted by section 1426(b) of the Act, constitute employment within the meaning of the Act. Services performed outside the United States, that is, outside the several States, the District of Columbia, and the Territories of Alaska and Hawaii (except certain services performed on or in connection with an American vessel—see paragraph (c)), do not constitute employment.

* * *

SEC. 402.206. [amended by T.D. 5519, *supra*] *Excepted services in general.*—Services performed on or after January 1, 1940, by an employee for the person employing him do not constitute employment for purposes of the tax if they are specifically excepted by any of the numbered paragraphs of section 1426(b) of the Act, that is, section 1426(b), as amended, effective January 1, 1940, by section 606 of the Social Security Act Amendments of 1939. Such services do not constitute employment for purposes of the tax even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel.

The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services rendered by the employee in an excepted class.

* * *

SEC. 402.207. *Included and excluded services.*—If a portion of the services performed by an employee for the person employing him during a pay period constitutes employment, and the remainder does not constitute employment, all the services of the employee during the period shall

for purposes of the tax be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 1426(b) of the Act constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

If *one-half or more* of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then *all* the services of that employee for that person in that pay period shall be deemed to be employment.

If *less than one-half* of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then *none* of the services of that employee for that person in that pay period shall be deemed to be employment.

* * *

SEC. 402.208. *Agricultural labor*.—(a) *In general*.—Services performed by an employee for the person employing him which constitute “agricultural labor” as defined in section 1426(h) of the Act are excepted. The term as so defined includes services of the character described in paragraphs (b), (c), (d), and (e) of this section.

In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(b) *Services described in section 1426(h)(1) of the Act*.—Services performed on a farm by an employee of any person in connection with any of the following activities are excepted as agricultural labor:

(1) The cultivation of the soil;

(2) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(3) The raising or harvesting of any other agricultural or horticultural commodity.

The term "farm" as used in this and succeeding paragraphs of this section includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets), do not constitute "farms."

(c) *Services described in section 1426 (h) (2) of the Act.*—The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms are excepted as agricultural labor, provided the major part of such services is performed on a farm:

(1) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(2) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

The services described in (1) above may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semi-skilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the exception does not extend to services performed by employees

of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

(d) *Services described in section 1426(h)(3) of the Act.*—Services performed by an employee in the employ of any person in connection with any of the following operations are excepted as agricultural labor without regard to the place where such services are performed:

- (1) The ginning of cotton;
- (2) The hatching of poultry;
- (3) The raising or harvesting of mushrooms;
- (4) The operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying or storing water for farming purposes;
- (5) The production or harvesting of maple sap or the processing of maple sap into maple sirup or maple sugar (but not the subsequent blending or other processing of such sirup or sugar with other products); or
- (6) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 1426(h)(4) of the Act.*—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see subparagraph (2), below), produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations.

Generally services are performed "as an incident to ordinary farming operations" within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed "as an incident to ordinary farming operations."

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, provided such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may be excepted whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in subparagraphs (1) and (2), above, do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the

excepted services described in such subparagraphs must be rendered in the actual handling, planting, drying, packing packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

In the
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLARK SQUIRE, Collector of Internal Revenue
Appellant,

VS.

SUMNER RHUBARB GROWERS' ASSOCIATION, a Coopera-
tive Agricultural Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

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MAY 1 1920

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INDEX

	Page
Notice of Correction.....	1
Questions Presented	2
Argument:	
(c) Is Sumner Rhubarb Co-operative an Agricultural or Horticultural Organization?.....	2
(b) Were the Manager and Clerical Worker for the Co-operative Exempt from Social Security Tax?.....	7
(c) The Record Does Establish that the Taxpayer was Exempt from Income Tax Under Section 101 (12) of the Code and that the Services in Question were Exempt Under Section 1426 (h) (4).....	8
(l) Letter from Commissioner Internal Revenue, Exhibit No. 1.	9, 10
(d) Services Here Involved Would Constitute Agricultural Labor Within the Meaning of the Statute, sec. 1426 (h) Sub-Sec. 4.....	11
Conclusion	18

CITATION

Cases:

<i>Northern Cedar Co. v. French</i> , 131 Wash. 394.....	5
<i>In Maxwell v. Lancaster</i> , 81 Wash. 602.....	5
<i>Stromberg Hatchery v. Iowa Employment Security Com'n.</i> 33 N.W. (2d 498).....	5
<i>Lake Regent Packing Association v. U. S.</i> , 146 Fed. 2nd 157 (C. A. 5th).....	13
<i>Birmingham v. Ruckers Breeding Farm</i> (1945) 152 Fed. 2nd 837	6, 9, 13
<i>U. S. v. Navar</i> , 158 Fed. 2nd, 91 (C. A. 5th).....	13
<i>Lee Wilson & Co. v. U. S.</i> , 171 Fed. 2nd, 503 (C. A. 5th	13
<i>Miller v. Berger</i> , 161 Fed. 2nd, 992.....	14
<i>Miller v. Bettencourt</i> , 161 Fed. 2nd, 995.....	14
<i>Miller Hatcheries v. Boyer</i> , 8 Cir. 131 Fed. 2nd, 383.....	7
<i>Walling v. Rocklin</i> , 8 Cir. 132 Fed. 2nd, 3.....	7

Statutes:

Rem. Rev. Statutes of Wash. sec. 3904-3923.....	3
Internal Revenue Code:	
26 U. S. C. 101 (1).....	1, 3, 9, 10
26 U. S. C. 101 (12).....	8, 9, 10, 11
26 U. S. C. 1426 (h).....	11
26 U. S. C. 1426 h (4).....	8, 11
Revised Act of 1928, Sec. 103 (12).....	9, 10, 11
26 U. S. C. 1426 (1), (2), (3).....	11

Treasury Regulations:

Sec. 29, 101 (1)-1.....	15
Sec. 402.208.....	15
Sec. 402.208 (e).....	16
Sec. 402.208 (e) (1), (2), (3).....	16, 17

Miscellaneous: :

Webster's Dictionary	7
2 Am. Juris. 395.....	4
House Rep. 728.....	13
Senate Rep. 734.....	13

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BRIEF FOR THE APPELLEE

NOTICE OF CORRECTION

Notice is hereby called to the typographical error found in the conclusions of law on page 38 of the Transcript of Record in that in paragraph 3 of said page 38, the section set forth therein as 10 (1) should be 101 (1).

STATEMENT OF FACTS

The first six pages of the appellant's brief, down to "Statements of points to be urged," are substantially accurate in what is set forth therein.

To make the facts more complete the appellee desires to add the following statement of fact: The Sumner Rhubarb Co-operative is now, and, during the tax period in question, was set up for the purpose of assisting rhubarb farmers of the Sumner valley locality in handling, planting, packing, grading, storing, or delivering to market or to storage or to a carrier for transportation to market, agricultural or horticultural commodities. During the period involved in this suit, the co-operative was storing, delivering to storage and to market and to carriers for transportation to market, rhubarb grown by farmers who were all members of the association or organization. (R. 3), (R. 67), (R. 72), (R. 74), (R. 77).

QUESTIONS PRESENTED

It is believed that the questions presented can be more clearly set forth as follows:

1. Is the appellee, Sumner Rhubarb Growers' Association, a labor, agricultural, or horticultural organization, and as such exempt from social security tax?

2. Whether or not section 101 (1) of the Internal Revenue Code and 101 (12) are mutually exclusive.

3. Whether the service of all the Sumner Rhubarb Co-operative should be exempt from social security tax, for the reason that they were doing work defined as "agricultural labor", in section 1426 (h) of the Code, as amended.

ARGUMENT

Is Sumner Rhubarb Co-operative An Agricultural or Horticultural Organization?

(a) It is agreed that the appellee was included under Session Laws of the State of Washington for

the year 1913 as a co-operative. The statutes of Washington covering co-operative associations can be found in Remington's Revised Statutes of Washington. Section 3904 reads as follows:

"CO-OPERATIVE ASSOCIATIONS — WHO MAY ORGANIZE—PURPOSES. Any number of persons, not less than five, may associate themselves together as a co-operative association, society, company or exchange for the transaction of any lawful business on the co-operative plan. For the purposes of this act the words "association," "company," "exchange," "society" or "union" shall be construed the same. .. '13, p. 50, sec. 1)"

The Sumner Rhubarb Co-operative was set up by farmers who grew rhubarb in the Sumner valley. The purpose of the co-operative was to help all rhubarb farmers in every way possible. The members of the association found that they could help the farmer members by purchasing packing facilities and by assisting them in obtaining a market for the rhubarb. The Internal Revenue Code exempts from income tax all labor, agricultural and horticultural organizations." The Code sec. 1426, sub-section (b), defines employment which is taxable, but expressly says that any service performed in the employ of an agricultural or horticultural organization is exempt from employment tax, if it is exempt from income tax under section 101 (1). Since the Sumner Rhubarb Co-operative is an agricultural or horticultural organization and is exempt from income tax under section 101 (1), then it is therefore exempt from social security tax. The whole question is as simple as that. The government says that the cooperative is not an agricultural or horticultural organization. To say this is pure and simple quibbling, but since the appellant is taking the matter

seriously it will be necessary for the appellee to show that the association is a horticultural or agricultural organization. According to volume 2, American Jurisprudence, page 395, section 2,

“Agriculture, in the broad and commonly accepted sense, may be defined as the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account. The term is broader in meaning than “farming”; and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, and bee raising, and more recently, “ranching.” It refers to the field, or farm, with all its wants, appointments, and products, as horticulture refers to the garden, with its less important, though varied products.

Engagement by an agriculturist in another distinct business, either on or off his land, such as sawmill operations for hire or as a commercial enterprise, manufacturing for others, except simple processing of farm products, commercial mining, and logging and lumbering solely for the purpose of securing lumber, is usually held to be no part of the ordinary pursuit of agriculture, although such work may, in some circumstances and to a limited extent, be incidental to agriculture. The term “agricultural” has been defined as “pertaining to, connected with, or engaged in agriculture.” A farm laborer, as ordinarily understood, is one who labors upon a farm in raising crops or doing general farm work.

Although logically, such terms as “agricultural products,” “farm produce,” etc., would include

all things produced in the course of the pursuit of agriculture, their meaning, when used in tax or license statutes, is frequently dependent upon the context, or upon an express definition or limitation to a given class of products. Various included under such statutes are both vegetable and animal products, including those of the field, garden, trees, orchards, livestock, poultry, eggs, dairy products, meats, nuts, and honey."

The Supreme Court of the State of Washington has defined agriculture in the following language: *Northern Cedar Co. v. French*, 131 Wash. 394, page 419.

"In its broad use it (agriculture) includes farming, horticulture and forestry, together with such subjects as butter and cheese making, sugar making, etc." Webster's New International Dictionary. "In a broad sense agriculture includes horticulture and forestry as well as what is ordinarily called farming." Nelson's Loose Leaf Encyc. The dictionaries and encyclopedias generally concur in the foregoing definition of agriculture. In *Maxwell v. Lancaster*, 81 Wash. 602, 143 Pac. 157, we said: "Horticulture is a branch of agriculture and can be included in an act relating to agriculture, without violating the rule which prohibits the union in one act of disconnected and unrelated matters."

The court's attention is called to the attitude taken by other courts and their tendency toward a broad construction of the term "agricultural labor" *Stromberg Hatchery v. Iowa Employment Security*, Com'n. 33 N. W. (2d) 498, syllabus 4.

"Salesmen, cullers, testers, office clerks, office manager, chick sexer, incubator watcher, incubator operator, and handyman who were employed by commercial poultry hatchery, and whose services were necessary to conduct and operation of such business, performed services in "connection with raising or hatching of poultry" so as to

be "agricultural labor" excluded from Iowa Employment Security Law, notwithstanding that not all such employees were actually engaged in manual process of incubating chicks. Code 1946, sec. 96.19, subd. 7, par. 8 (4)"

In its ruling as quoted from decision in case of *Birmingham v. Ruckers Breeding Farm*, 152 Fed. 2nd 837 (Internal Revenue) said:

"It is held that the services of the employees of the M Company, which is engaged in the business of hatching chickens, can not properly be classified as 'agricultural labor' inasmuch as such services are commercial and are not performed as an incident to ordinary farming operations. The taxing provisions of the Social Security Act are therefore applicable."

The Court answers this and we quote:

"That is the situation which existed when Congress, in 1939, undertook to define the term "Agricultural labor" and enacted the statute in controversy. Concededly, Congress was concerned with relieving agriculture of the social security tax burden by including in the term "Agricultural labor" certain services which had been held not to be exempt, but which were considered to be in reality an integral part of farming activities. See House Rep. No. 728, 76th Cong., 1st Sess. (1939)-2 Internal Revenue Cum. Bull., p. 538) and Senate Rep. No. 734, 76th Cong., 1st Sess. (1939-2 Internal Revenue Cum. Bull., p. 565).

It seems clear that Congress, in defining "agricultural labor," used the broad language "services performed * * * in connection with the hatching of poultry" advisedly and in the realization that the burden of taxes imposed upon hatcheries which procured their eggs from farmers would have to be borne by agriculture. If Congress had intended that agriculture should be relieved of

this tax burden only to the extent of the taxes upon wages paid to those rendering services in the incubation of eggs, it would, we think, have selected appropriate language to express that intent."

Other cases which follow along the same lines are: *Miller Hatcheries v. Boyer*, 8 Cir. 131 Fed. 2nd, 383; *Walling v. Rocklin*, 8 Cir. 132 Fed. 2d 3. They all show that in taxation the law is to be construed in favor of those engaged in agricultural and horticultural work.

(b) Were the Manager and Clerical Worker for the Co-operative Exempt from Social Security Tax?

The appellant has contended that the co-operative was not a horticultural or agricultural organization and that therefore the only way the manager and clerical worker could be considered exempt from the social security tax would be by proving that they actually did agricultural labor. In other words, unless the employee of the Sumner Rhubarb Co-operative drove a truck, loaded and unloaded boxes of rhubarb or some other work in the process of which their hands would become dirty, then they were not agricultural workers. According to Webster, a definition of "organization" is "the act or process of forming organs or instruments of action." "Suitable discharge of parts which are to act together in a compound body." The only sensible construction of the taxation of employees of agricultural or horticultural operators who have formed an association would be to say that no matter what type of work was done, it was done for one purpose. In the case of the rhubarb cooperative, it was a united effort to benefit those who operated rhubarb farms. Each worker whether he be timekeeper, manager, secretary or common laborer in such a co-operative association, should be considered to do agricultural labor.

On page 83 of the transcript of record, Mr. A. J. Goettsch testified that he was acting as manager of the Rhubarb Growers Association during the taxable period in question here. He also said that sometimes he unloaded boxes of rhubarb from trucks and piled them on the platform of the Rhubarb Association's shed. He stated that he was paid as manager but that there was no distinction made as to the pay for the manual work he did and for other work done as the manager. If we follow the government's position to its ridiculous conclusion, Mr. Goettsch would be required to carry a stop watch so that his labor would be tax free while he was unloading boxes, and taxable as soon as he walked from the shed to the office and wrote down the number of boxes unloaded. The Commissioner of Internal Revenue must know that the legislature did not intend any such plan of taxation when the Social Security Act was written. Surely the Court will agree that the Rhubarb Association is an organization.

- (c) The Record does establish that the Taxpayer was exempt from Income Tax under Section 101 (12) of the Code and that the services in question were exempt under 26 U.S.A., Sec. 1426 (h) (4)

Certainly the record before this court on review establishes that the taxpayer was and is exempt from income tax under section 101 (12) of the Code. On page 97 of the Transcript of Record I quote from the attorney for the Collector of Internal Revenue as follows: "Yes, on the proof they have made here I don't think there is any question about it. They are a co-operative marketing institution and they come exactly within the wording form 101 (12)." (Note the use of the word "institution" rather than "organization.")

In line with the government's reasoning heretofore, a marketing institution" would not be expressly exempt under section 101 (12) because co-operative marketing institutions are not mentioned. Following the reasoning further, and using the government's attorney's phrase "co-operative marketing institution," are we able to say that if we called our rhubarb co-operative an "institution" rather than an "association" we might be considered an organization exempt under 101 (1)?

THE LETTER FROM VICTOR H. SELF, Deputy Commissioner Internal Revenue, Plaintiff's Exhibit No. 1

The letter from the deputy commissioner internal revenue, dated June 24, 1948, recites that the Rhubarb Growers' Association was granted exemption under section 103 (12) of the Revised Act of 1928 (R. 45). Said section was in effect prior to section 101 (1) and it read word for word like section 101 (12) now reads. It is obvious that Congress had no intention of decreasing the special privileges granted agricultural and horticultural organizations under section 103 (12), but on the other hand, intended to increase the special tax exemption rights of agricultural and horticultural organizations by using such a broad exemption as, and I quote, "labor, agricultural or horticultural organizations." Merely because Congress carried the old section 103 (12) over, and called it 101 (12) should certainly not restrict the tax exemption rights of an agricultural or horticultural organization. If Congress had intended to except such agricultural or horticultural organizations as the Rhubarb Growers' Association from the general exemption 101 (1), then it would have done so in that section *Birmingham v. Ruckers Breeding Farm*, supra. It is reasonable, therefore, to say that it was the intention of the legislature to extend

rather than limit exemptions of agricultural and horticultural organizations by carrying over the old section 103-(12), and making it 101 (12). Just as in the case at bar and as shown by the letter from assistant commissioner Self, certain rights had been acquired by exemptions allowed such organizations as the appellee, and rather than run the risk of limiting or restricting, Congress carried over the old law in addition to adding the all-inclusive section 101 (1). The Social Security Act was still more recent and showed the kindly attitude of Congress toward the exemption of Agricultural or Horticultural organizations, but said Social Security Act provided that the service of anyone performed in the employ of an agricultural or horticultural organization, exempt from income tax under section 101 (1) should likewise be exempt from social security tax. The Commissioner of Internal Revenue forwarded to the appellant a letter enclosing forms of exemption affidavits to be made out and returned. (R. 45').

The letter does not use the phrase "exemption affidavit," but refers to it as being information which the association was requested to furnish to determine whether the association had been operating in such a manner as to entitle it to exemptions from federal income tax under section 101 (12). Because the association believed that the recent legislation entitled it to more exemptions than it had been allowed under section 103 (12), now 101 (1), it refused to sign the exemption affidavits binding itself exclusively to the rights and exemptions under section 101 (12). Since the government's demand was not immediately complied with the Commissioner of Internal Revenue, or some one or more of his agents, became irritated, and by letter of March 12, 1948, revoked appellee's exemption from income tax. To impress upon the court the arbitrary conduct on the part of the government agent,

we call to your attention the fact that the Commissioner of Internal Revenue did not have any information that the Rhubarb Growers' Association had changed its status or operation in any way from its operation since September 3, 1931, when the exemption from income tax was allowed under section 103 (12), now sec. 101 (12). Not only was the revocation to be a current penalty against the association, but it was also to be ante-dated and become effective as of January 1, 1939, (R. 46). You can imagine how inconvenient it has been to the association to fulfill the requests of the many Internal Revenue agents who have wanted to examine Association records for income tax determination for the years 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947. All of this because the Department of Internal Revenue is provoked at the association for insisting upon the right to benefit from the broad exemption of section 101 (1).

(d) Services Here Involved Would Constitute Agricultural Labor Within the Meaning of the Statute, Sec. 1426 (h) Sub-Sec. 4

If by now the court is not convinced that the legislature exempt Rhubarb Growers' Association under the general exemption, then we must show that exemption of the employees under Social Security Act in the case at bar should be allowed because each of the employees was actually doing agricultural labor. In defining agricultural labor, section 1426, sub-section 1, 2, 3, use the phrase "in connection with." Paragraph 4 of said section 1426, sub-section (h) leaves out the words "connection with" and says that agricultural labor (exempt from social security tax) is such labor or services performed "in hauling, planning, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a

carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident in ordinary farming operations or, *in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market.* The provisions of this paragraph shall not be deemed to be applicable to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. (Italics supplied.)”

From the context the words “in connection with” are implied.

The purpose for which the association is formed and the operations which the Government admits by its letter, plaintiff’s exhibit No. 1, makes the work of a manager and the office worker definitely an “incident in preparation of such fruits or vegetables for market.” The appellant has called specific attention to that part of the Act which refers to terminal market for distribution for consumption. There is nothing in the facts of the case at bar which would place the appellee in the category of a terminal market for distribution for consumption. There is nothing in the facts of the case at bar which would place the appellee in the category of a terminal market for distribution for consumption. The handling, packing, storing and delivering to the market and to a carrier of the rhubarb was in each instance a service performed as an incident to the *ordinary farming operations* of a rhubarb grower. The boxes in which the rhubarb grower packed his rhubarb were furnished by the association (R. 68). The farmer packs the rhubarb in said boxes and trucks it to the warehouse rented by the appellee, which is a

clear-cut illustration of an incident to ordinary farming operation. The sale and shipping and storage for shipping are all incidents to the ordinary farming operations.

The Social Security Act is fundamentally not an act which was passed to include workers for seasonal operations. The evidence in this case definitely makes the operations of the appellee for the period in question seasonal only, being operations in each year, carried on from January to May, or, approximately four months. (R. 69). Also your attention is called to the fact that most of the association's employees are high school boys who only work from 3:30 in the afternoon to 6:30 or 7:00 (R. 67). You will note on page 20 of the appellant's brief that certain decisions are referred to and listed under footnote No. 16, in which agricultural labor was defined, the cases being *Lake Regent Packing Association vs. United States*, 146, Fed. 2d, 157 (C. A. 5th); *Birmingham vs. Rucker's Breeding Farm*, (1945) supra; *U. S. Navar*, 158 Fed. 2d, 91 (C. A. 5th); *Lee Wilson & Co. vs. U. S.*, 171 Fed. 2d, 503 (C. A. 8th). The foregoing are cases in favor of the appellee, whereas the cases cited by the appellant in the body of its brief on page 20 are the cases which created the reason for Congress to correct the misunderstanding as to what was meant by "agricultural labor". *Birmingham vs. Rucker's Breeding Farm*, supra. Please re-read that portion of the Rucker case already set forth herein. Quoting from House Rep. 728, and Senate Rep. 734 (1939-2 Int. Rev. Cum. Bull, pages 543 and 560); in House Rep. 728 under the heading "definitions" appears the following explanation: (1939-2 Int. Rev. Cum. Bull, pages 552-553); Definition of agricultural labor under section 209 (1); 'The present law exempts

agricultural labor' without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees effected. The committee believes that greater exactness should be given to the exception and that it should be *broadened* (*italics is ours*) to include as 'agricultrual labor' certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidents of the taxes falls exclusively upon the farmers, a factor which, in numerouse incidences, has resulted in the establishment of competitive advantages on the part of large farm operators, to the detriment of the smaller ones . . . "Paragraph 2 of the sub-section excepts services of the employee of the owner (whether or not such owner is in possession) or tenant of the farm in connection with the operation, management or maintenance of such farm, if the major part of those services are performed on the farm. Under this language, certain services are to be regarded as agricultural, even though they are not performed in conducting any of the operations referred to in paragraph 1. Services performed in connection with the operation, management, or maintenance of a farm may include, for example, services performed by carpenters, painters, farm supervisors, irrigation engineers, book-keepers, and other skilled or semi-skilled workers whose services contribute in any way to the proper conduct of the farm or farms operated by their employer . . . ". From the foregoing it can easily be seen that Congress was not satisfied with the decisions rendered prior to the 1939 amendments. None of the cases which the appellant cites are in point. On page 22 of appellants brief, case of *Miller v. Berger*, 161 Fed. 2d 992, and *Miller v. Bettencourt*, 161 Fed. 2d, 995, are cited.

Those cases are set forth as facts, situations where the employer purchased fruit outright from the farmer, and the employment was in connection with a terminal market. In many places throughout the appellant's brief, Commissioner's rulings and Treasury regulations are recited as authority for forcing the Rhubarb Growers' Association to pay the social security tax. We don't admit that the rulings and regulations are binding on anyone, but the Internal Revenue agents; at the same time, however, it is interesting to note that if the Commissioner of Internal Revenue followed the regulations and rulings which are set forth in appellant's brief on pages 28, 29, 31, 33 and 34, this case would not now be before this court. Treasury regulation 111 promulgated under the Internal Revenue Code reads in part as follows: "Sec. 29.101 (1)-1. Labor, agricultural and horticultural organizations—the organizations contemplated by sec. 101 (1) as entitled to exemption from income taxation are those which—

(1) Have no net income inuring to the benefit of any members.

(2) Are educational or instructive in character; and

(3) Have as their object the betterment of the conditions of those engaged in such pursuits, improvement of the grade of their products and the development of a higher degree of efficiency in their respective occupations . . . "

The purpose and object of the Rhubarb Association is just exactly that which the Treasury regulation says should be an agricultural and horticultural organization, exempt from income tax. (R. 3) (R. 67) (R. 68).

Congress has defined agricultural labor, but section 402.208 of the Treasury regulation undertakes to do a

better job of defining the term "Agricultural labor." Sub-section (e) of the Treasury regulation defines agricultural labor as follows: "Service performed by an employee in the employ of a *farmer or a farmer's co-operative organization or group* in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity, other than fruits and vegetables (see Sub-paragraph (2) below), produced by such farmer or farmers, members of such organization or group of farmers are excepted, providing such services are performed as an incident to ordinary farming operations.

Generally services are performed as an incident to ordinary farming operations within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmer's co-operative organization or group as a prerequisite to the marketing in its unmanufactured state of any agricultural or horticultural commodity produced by such farm or by the members of such farmer's organization or group . . . "

The Internal Revenue Department, if it followed the terms of the last regulation of the Treasury Department, would never have forced the appellee to go to court. Is not the Sumner Rhubarb Co-operative a "farmers' cooperative organization or group?" The packing and boxing of the rhubarb is a prerequisite of marketing it. All of the rhubarb for which the appellee furnished the boxes was produced by members of the co operative. Now to make the government's position still more incongruous let's look at sub-paragraph of said sub-section (e).

“(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage to market or to a carrier for transportation to market of fruits and vegetables, whether or not of a perishable nature, are excepted as agricultural labor, providing such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading or storing of fruits, or in the cleaning of beans are performed as an incident to their preparation for market, such services may be excepted, whether performed in the employ of a farmer, a farmer’s co-operative, or a commercial handler of such commodities.” This would very definitely place the Sumner Rhubarb Co-operative employees within the exemption. (R. 35).

Sub-section 3 of the Treasury regulation unreasonably cuts down the exemption allowed in sub-sections (1) and (2). From what the appellee has shown thus far, it can be seen that the regulation which makes a distinction such as the sub-sections of said Treasury regulation is arbitrary and without any constructive reason. The Rucker case didn’t follow it, but in fact threw it out.

The Treasury regulation goes so far as to say that the Federal Statute should not be given its express intent. The regulation says in part, “Moreover, since the excepted services described in such sub-paragraphs must be rendered in the actual handling, planting, drying . . . or delivering to storage or to a market or to a carrier for transportation to market, of the commodity, such services do not for example include services performed by stenographers, bookkeepers, clerks and other office employees, *even though such services*

may be in connection with such activities. Which is to prevail, the Treasury regulation or the Federal Statute?

In conclusion and to summarize:

1. The Sumner Rhubarb Growers' Association is an agricultural or horticultural organization, exempt under Revenue Code Sec. 101 (1) from income tax and is therefore exempt from social security tax.

2. The Sumner Rhubarb Growers' Association, if it so desires, may claim its exemption from income tax under Internal Revenue Code 101 (12).

3. If the association obtains exemption under sec. 101 (12) then its employees are all furnishing service exempt under section 1426 (h) (4) of the Social Security Act.

The decision of the District Court should be affirmed.

Respectfully submitted,
JOHN W. FISHBURNE,
Attorney for Appellee

No. 12,406

**In the United States Court of Appeals
for the Ninth Circuit**

**CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE,
APPELLANT**

v.

**SUMNER RHUBARB GROWERS' ASSOCIATION, A COOPERA-
TIVE AGRICULTURAL CORPORATION, APPELLEE**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

REPLY BRIEF FOR THE APPELLANT

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FILED
MAY 27 1950

PAUL P. O'BRIEN

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,406

**CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE,
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TIVE AGRICULTURAL CORPORATION, APPELLEE**

***ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON***

REPLY BRIEF FOR THE APPELLANT

Some matters discussed in the brief filed herein on behalf of the Sumner Rhubarb Growers' Association need clarification.

First. Counsel for the taxpayer seem to be confused as to organizations which are exempt from income tax under Section 101(1) of the Internal Revenue Code and organizations which are exempt from the income tax under Section 101(12).

It is agreed, as taxpayer states (Br. 2-3), that the taxpayer is a cooperative association under the laws of the State of Washington. It may be conceded, as

the taxpayer contends (Br. 3-7), that it also is an "agricultural" organization within the broad meaning of that term. But that does not answer the first question involved here, i.e., whether the taxpayer is exempt from income tax under Section 101(1) of the Code.

Whether the taxpayer is so exempt is a federal question. It does not follow that a bona fide cooperative agricultural association or organization under state law is automatically exempt under Section 101(1) from payment of the federal income tax. The burden is upon the taxpayer claiming such exemption to prove that it is the type of "labor," "agricultural" or "horticultural" to which the statute applies. This the taxpayer has not done. Without any authority or basis therefor, other than the fact that it was a bona fide cooperative under the laws of the State of Washington, the taxpayer concludes that (Br. 3)—

Since the Sumner Rhubarb Co-operative is an agricultural or horticultural organization and is exempt from income tax under section 101(1), then it is therefore exempt from social security tax. The whole question is as simple as that.

Later in its brief, under the heading "Services Here Involved Would Constitute Agricultural Labor Within the Meaning of the Statute" (p. 11), the taxpayer quotes from Section 29.101(1)-1 of Treasury Regulations 111 dealing with exemption under Section 101(1) of the Code, and adds (p. 15):

The purpose and object of the Rhubarb Association is just exactly that which the Treasury regulation says should be an agricultural and horticultural organization, exempt from income tax.

Not only the taxpayer's "purpose and object," which are not controlling, but also its actual operations clearly exclude it from the class of organizations cov-

ered by this provision of the Regulations. (1) It is not an organization having no net income inuring to the benefit of any member. On the contrary, all of its net income is distributable to its members. (2) The record does not show that it engages in any activities which could be classed as educational or instructive in character. Its activities are purely commercial, although carried on in cooperative form, and are for the financial rather than educational benefit of its members. (3) Nor is there anything in the record to show that any object or activity of the taxpayer is directed to the betterment of the conditions of those engaged in the growing of rhubarb or any other agricultural commodity, either members or non-members (other than the financial betterment of its members), improvement of the grade of their product, or the development of a higher degree of efficiency in their occupation. It differs radically in all of these essential respects from the agricultural fair association which was held exempt in I.T. 2325, V-2 Cum. Bull. 63 (1926), and the Farmers Educational and Cooperative State Union of Nebraska which was held exempt in *Farmers Union State Exchange v. Commissioner*, 30 B.T.A. 1051. Compare A. R. M. 79, 3 Cum. Bull. 235 (1920), denying exemption under this provision to a register association organized for profit, its purpose and activities being to render a service to the breeders of pure bred live stock.

This confusion is emphasized in the discussion (Br. 8-11) under the heading that the record does establish that the taxpayer was exempt under Section 101(12) of the Code.¹ Aside from its criticism of the Commis-

¹ The observations (Br. 8-9) concerning the use of the word "institution" instead of "organization" at the trial by counsel for the Collector is without point. The taxpayer's exempt status, regardless of the statutory provision under which it is claimed, depends upon the facts and not upon terminology.

sioner for refusing to recognize its exempt status in adjusting its claims for refund of social security taxes,² the taxpayer in this discussion points to no facts (other than that it was a bona fide agricultural cooperative under state law) upon which it can be held to be exempt from federal income tax under Section 101(12). But with respect to the statute, the taxpayer states (Br. 9-10):

Said section was in effect prior to section 101(1) and it read word for word like section 101(12) now reads. It is obvious that Congress had no intention of decreasing the special privileges granted agricultural and horticultural organizations under section 103(12), but on the other hand, intended to increase the special tax exemption rights of agricultural and horticultural organizations by using such a broad exemption as, and I quote, "labor, agricultural or horticultural organizations." Merely because Congress carried the old section 103(12) over, and called it section 101(12) should certainly not restrict the tax exemption rights of an agricultural or horticultural organization. If Congress had intended to except such agricultural or horticultural organizations as the Rhubarb Growers' Association from the general exemption 101(1), then it would have done so in that section *Birmingham v. Ruckers Breeding Farm*, supra. It is reasonable, therefore, to say that it was the intention of the legislature to extend rather than limit exemptions of agricultural and horticultural organizations by carrying over the old section 103(12), and making it 101(12). Just as in the case at bar and as shown by the letter from assistant commissioner Self, certain rights had been ac-

² This criticism is wholly unjustified. Its claims were based in part upon its alleged exempt status. The burden was upon it to establish this fact, and in view of its refusal or inability to furnish the necessary evidence, the Commissioner was fully justified in declining to recognize its exempt status. But regardless of the merit of its criticism, the same burden rested upon the taxpayer in this proceeding.

quired by exemptions allowed such organizations as the appellee, and rather than run the risk of limiting or restricting, Congress carried over the old law in addition to adding the all-inclusive section 101(1).

As pointed out in the brief heretofore filed on behalf of the Collector of Internal Revenue (pp. 12-13), the first general income tax law enacted in 1913 soon after adoption of the Sixteenth Amendment to the Constitution excepted "labor," "agricultural," and "horticultural" organizations from the income tax, and the language exempting such organizations has continued unchanged through all subsequent enactments. On the other hand, the first provision for exempting cooperative agricultural organizations was enacted as Section 11(a) Eleventh of the Revenue Act of 1916, c. 463, 39 Stat. 756. It was changed by Section 231(11) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and again by Section 231(12) of the Revenue Act of 1926, c. 27, 44 Stat. 9, in which form it now appears in the Code.

The taxpayer was organized in 1930 (R. 72), and in 1931 the Commissioner ruled that it was exempt from federal income tax under Section 103(12) of the Revenue Act of 1928, c. 852, 45 Stat. 791 (R. 36). The taxpayer never claimed exemption under Section 101(1) of the Code or corresponding provision of earlier Revenue Acts prior to the filing of its claims for refund of social security taxes. In any event, the Commissioner certainly never recognized it as exempt under that provision. Its claims for refund (R. 7-21) are based upon the ground that the taxpayer was exempt under Section 101(1) of the Code and upon the further ground that the services for which the wages in question were paid constituted "agricultural labor" within the meaning of the amendments to the Social Security Act.

The letter of the Deputy Commissioner to the taxpayer's accountants dated June 24, 1948 (R. 44-48), states that by Bureau letter dated February 6, 1948, the taxpayer was advised that action on its claims was being held in abeyance pending a determination whether it was exempt under Section 101(1); that information on file disclosed that in a Bureau letter addressed to the Association on January 15, 1948, it was held that since the information furnished indicated that the activities of the Association consisted primarily of marketing agricultural products for its members, and in view of the provisions of Section 101(12) of the Code, exemption under Section 101(1) was denied; and that since the necessary information had not been furnished to the Commissioner as requested, the exemption under Section 103(12) of the 1928 Act had been revoked by Bureau letter of March 12, 1948, as of January 1, 1939, effective date of the Internal Revenue Code. The letter then proceeded to explain the manner in which the claims would be adjusted, on the basis that the taxpayer had failed to show it was entitled to exemption under either provision.

Whether the taxpayer was exempt from federal income tax under either of the foregoing provisions depends upon the facts of each individual case, the burden of proving which is upon the taxpayer, and it is the contention of the Government here that the taxpayer has failed to establish its right to exemption under either provision for the period here involved.

Second. The taxpayer's criticism, under the heading "Were the Manager and Clerical Worker for the Co-operative Exempt from Social Security Tax" (Br. 7-8), of the Commissioner's method of determining the taxable status of those employees who devoted some part of their time to doing admittedly agricultural labor fails to take into consideration the provisions of Section

1426(c) of the Internal Revenue Code, under which his determination was made. Under that section no allocation of services is to be made. Under that section, if the services performed during one-half or more of any pay period constitute "employment" within the meaning of the statute all of the services of the employee are deemed to be "employment", while if such services performed by an employee during more than one-half of any pay period do not constitute "employment" within the meaning of the statute then none of the services rendered by that employee are to be taxed. Otherwise the taxpayer offers nothing constructive in answer to the precise question whether the services of the particular employees here involved constituted "agricultural labor" within the meaning of the statute. The discussion of this subject throughout its brief, to the extent it is applicable here, deals with services of the character which the Commissioner already has held in this case are not subject to the tax. We do not understand the taxpayer to disagree with the Commissioner's allocation of services of the particular employees here involved, as shown in the letter of June 24, 1948 (R. 46-47), and there is nothing in the record to show it was erroneous. Therefore, his determination should be accepted as correct.

CONCLUSION

The decision of the court below is wrong. It is contrary to the facts and the law and should be reversed and remanded to the court below with directions to dismiss the complaint.

Respectfully submitted,

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ELLIS N. SLACK,
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*Special Assistants to the
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J. CHARLES DENNIS,
United States Attorney.

GUY A. B. DOVELL,
Assistant United States Attorney.

MAY, 1950.

No. 12410

United States
Court of Appeals
For the Ninth Circuit.

L. F. CORRIGAN and CLARA R. CORRIGAN,
et al.,

Appellants,

vs.

SAN MARCOS HOTEL COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court
District of Arizona.

FEB 8-1930

PAUL P. O'BRIEN,
CLERK

No. 12410

**United States
Court of Appeals
For the Ninth Circuit.**

**L. F. CORRIGAN and CLARA R. CORRIGAN,
et al.,**

Appellants,

vs.

**SAN MARCOS HOTEL COMPANY, a Corpora-
tion,**

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Transcript of Record

**Appeal from the United States District Court
District of Arizona.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	5
Appellants' Statement of Points and Designation of Record to Be Printed.....	109
Appellee's Designation of Additional Parts of Record Appellee Considers Material and Desires Printed and Heard.....	111
Attorneys of Record.....	1
Bond on Appeal.....	30
Clerk's Certificate to Record on Appeal.....	106
Complaint	2
Defendant's Proposed Findings of Fact and Conclusions of Law.....	10
Designation of Contents of Record on Appeal..	33
Exhibits, Plaintiffs':	
No. 1—Deposition of Clara R. Corrigan...	43
—direct	44
—cross	48
—redirect	68

INDEX	PAGE
Exhibits, Plaintiffs'—(Continued):	
2—Deposition of L. F. Corrigan.....	69
—direct	69
—cross	72
3—Personal Property Floater Policy.	76
4—Inland Marine Proof of Loss.....	89
Findings of Fact and Conclusions of Law....	17
Judgment	23
Memorandum in Support of Motion for New Trial	24
Minute Entry of March 1, 1949.....	8
Minute Entry of March 9, 1949.....	10
Minute Entry of October 3, 1949.....	29
Motion for New Trial.....	24
Plaintiffs' Notice of Appeal.....	30
Plaintiffs' Objections to Proposed Findings of Fact and Conclusions of Law.....	12
Plaintiffs' Proposed Findings of Fact and Con- clusions of Law.....	13
Reporter's Transcript.....	35
Statement of Point Upon Which Plaintiffs In- tend to Rely Upon Their Appeal.....	32
Stipulation Re Taking of Depositions.....	42

INDEX

PAGE

Witness, Defendant's:

Hicks, Mrs. Elizabeth

—direct 98

—cross 103

Witness, Plaintiffs':

Quarte, John

—cross 36, 97

—direct 92

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In the United States District Court
for the District of Arizona

No. Civ. 1211—Phx.

L. F. CORRIGAN and CLARA R. CORRIGAN,
who sue on behalf of General Insurance Com-
pany of America, a corporation,

Plaintiffs,

vs.

SAN MARCOS HOTEL COMPANY, a corpora-
tion,

Defendant.

COMPLAINT

(Action for damages—Subrogation—
Diversity of Citizenship)

Plaintiffs Allege:

I.

Plaintiffs L. F. Corrigan and Clara R. Corrigan are husband and wife, and are now and were at all times herein mentioned, citizens and resident of the State of Texas. General Insurance Company of America is now, and was at all such times, a citizen and resident of the State of Washington, being a corporation duly organized and existing under and by virtue of the laws of that state, and having its principal place of business in the City of Seattle in said state. Said General Insurance Company of America was at all times herein mentioned authorized and licensed to transact its insurance business

within the state of Arizona. Defendant San Marcos Hotel Company is a citizen and resident of the State of Arizona, being a corporation duly organized and existing under and by virtue of the laws of the State of Arizona. Said defendant owns and operates the San Marcos Hotel at Chandler, Arizona. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3000.00) exclusive of interest and costs.

II.

On the 17th day of March, 1947, said General Insurance Company of America issued to said L. F. Corrigan and Clara R. Corrigan, a certain policy of insurance, wherein and whereby said General Insurance Company of America did agree to indemnify the said L. F. Corrigan and Clara R. Corrigan, for a term commencing the 17th day of March, 1947 and expiring by limitation on the 17th day of March, 1950, against damage to, or loss by theft, of personal property therein described, to the actual or scheduled value thereof not in excess of the sum of Forty Thousand Dollars (\$40,000.00). That, among other things, the personal property included and covered by said policy of insurance was the full length natural wild mink fur coat belonging to the insureds. The scheduled value of said fur coat was Seven Thousand Dollars (\$7000.00), and the actual value thereof was approximately Ten Thousand Dollars (\$10,000.00).

III.

On February 15, 1948, the said Clara R. Corrigan,

while a guest of defendant in its hotel at Chandler, Arizona, placed and left said mink coat under the care of said defendant. On said date, while said mink coat was under the care of said defendant, said mink coat was stolen, and it was not and has not been recovered and restored to the said Clara R. Corrigan.

IV.

Said policy of insurance contained the express provision that General Insurance Company of America, upon payment of loss, or damage, as a claim under said policy, should be legally subrogated to all rights and causes of action of said L. F. Corrigan and Clara R. Corrigan, to the extent of the payment made under said policy, against any person whose negligence or other wrongful conduct caused such loss or damage, or contributed thereto.

V.

The said L. F. Corrigan and Clara R. Corrigan duly performed each and all of the covenants, terms and conditions of said policy of insurance upon their part required, and on or about the 6th day of April, 1948, said General Insurance Company of America paid the said L. F. Corrigan and Clara Clara Corrigan, under the policy of insurance aforesaid, for the loss of the mink coat aforesaid, the sum of Seven Thousand Dollars (\$7000.00) and the said L. F. Corrigan and Clara R. Corrigan executed and delivered to said General Insurance Company of America proper articles of subrogation in the premises.

VI.

The plaintiffs L. F. Corrigan and Clara R. Corrigan, upon demand of said General Insurance Company of America, bring this action for and on behalf of said General Insurance Company of America under its right of subrogation aforesaid.

Wherefore, plaintiffs pray judgment against the defendant for the use and benefit of said General Insurance Company of America in the sum of Seven Thousand Dollars (\$7000.00), and for plaintiff's costs herein.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Plaintiffs.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed July 16, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named by its attorneys undersigned, and by way of answer to the Complaint of plaintiffs herein admits, denies and alleges as follows:

I.

Admits that defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and owns and operates the San Marcos Hotel at Chandler, Arizona;

alleges that defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph I of said Complaint, and, therefore, demands strict proof thereof.

II.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of said Complaint, and, therefore, demands strict proof thereof.

III.

Admits that on or about February 15, 1948 plaintiff Clara R. Corrigan was a guest at the San Marcos Hotel owned by defendant in Chandler, Arizona; denies that plaintiffs or any of them ever, in any manner, at any time material to this action placed or left a mink coat under the care of defendant; alleges that it is without sufficient information concerning the allegations that a mink coat belonging to plaintiff Clara R. Corrigan was stolen and was not and has not been recovered and restored to her to form a belief as to the truth or falsity thereof, and, therefore, demands strict proof of each and every such allegation in said Complaint contained; alleges that if a mink coat belonging to plaintiff Clara R. Corrigan was stolen from or lost by her, or was stolen or disappeared, while she was a guest of defendant at its said hotel in Chandler, Arizona, such stealing, loss or disappearance was occasioned by the negligence of the said plaintiff Clara R. Cor-

rigan and that defendant was not and is not responsible or liable on account of such stealing or loss.

IV.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs IV, V and VI of said Complaint, and, therefore, demands strict proof thereof.

V.

Denies each and every allegation in said Complaint contained not herein expressly admitted or denied for lack of information and belief.

Wherefore, defendant prays that plaintiffs take nothing by their said Complaint, but that the same be dismissed, and that defendant recover of and from plaintiffs its costs herein incurred.

CUNNINGHAM, CARSON,
MESSINGER & CARSON,

By /s/ C. A. CARSON, JR.,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 9, 1948.

In the United States District Court
for the District of Arizona

Civ. 1211

October, 1948 Term

L. F. CORRIGAN, et ux,

Plaintiffs,

vs.

SAN MARCOS HOTEL COMPANY,

Defendant.

MINUTE ENTRY OF MARCH 1, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for trial this day. Burr Sutter, Esquire, appears as counsel for the plaintiffs. C. A. Carson, Esq. and C. A. Carson III, Esq. appear as counsel for the defendant. Louis L. Billar is present as official reporter.

It Is Ordered that Burr Sutter, Esq. be and he is entered as associate counsel for the plaintiffs.

Both sides announce ready for trial.

Plaintiffs' Case:

John F. Quarty is now duly sworn and cross-examined by counsel for the plaintiffs as an adverse party.

Plaintiffs' Exhibit 1, deposition of Clara R. Corrigan, and Plaintiffs' Exhibit 2, deposition of L. F. Corrigan, are now admitted in evidence, subject to the defendant's objections.

Plaintiffs' Exhibit 3, insurance policy, is now admitted in evidence.

Plaintiffs' Exhibit 4, proof of loss, is now admitted in evidence.

Whereupon, the Plaintiffs' rest.

Defendant's Case:

John F. Quarty, heretofore sworn, is now called and examined on behalf of the defendant.

Mrs. Elizabeth Hicks is now duly sworn and examined on behalf of the defendant.

Whereupon, the Defendant rests.

Both sides rest.

Plaintiffs now move for judgment in accordance with prayer of complaint.

All evidence being in, the case is now argued by respective counsel to the Court.

It Is Ordered that the record show that this case is submitted and taken under advisement.

In the United States District Court
for the District of Arizona

Civ. 1211

October, 1948 Term

L. F. CORRIGAN and CLARA R. CORRIGAN,
et al,

Plaintiffs,

vs.

SAN MARCOS HOTEL COMPANY, a corpora-
tion,

Defendant.

MINUTE ENTRY OF MARCH 9, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

This case having been submitted and taken under
advisement and the Court having filed its memoran-
dum decision herein,

It Is Ordered that the defendant have judgment
herein.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

The Above-Entitled Action having come on regu-
larly for trial before the Court sitting without a
jury on the 1st day of March, 1949, the plaintiff
being represented by Messrs. Kramer, Morrison,
Roche & Perry by Burr Sutter, and defendant being

represented by Messrs. Cunningham, Carson, Messenger & Carson by Charles A. Carson and C. A. Carson, III, and the Court having heard the evidence and arguments of counsel, and the matter having been submitted for decision and the Court's memorandum of decision having heretofore been filed herein, the Court hereinafter states its

Findings of Fact, to-wit:

1. That plaintiff Clara R. Corrigan was negligent in caring for the fur coat which was lost and to recover for the loss of which this action was instituted.

2. That the negligence of plaintiff Clara R. Corrigan was the proximate cause of the loss of fur coat.

3. That the loss of said fur coat would not have occurred had plaintiff Clara R. Corrigan exercised ordinary care in its safekeeping.

The Court, upon the foregoing facts, makes the following

Conclusions of Law:

1. That plaintiffs are not entitled to recover from defendant for the loss of said fur coat.

2. That defendant is entitled to judgment against plaintiffs on plaintiffs' complaint and for defendant's costs incurred herein.

Dated: March, 1949, at Phoenix, Arizona.

.....,

Judge.

[Endorsed]: Filed March 21, 1949.

[Title of District Court and Cause.]

PLAINTIFFS' OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Come Now the plaintiffs and make the following objections to the findings of fact and conclusions of law heretofore proposed by the defendant herein:

1. Object to finding of fact No. 1, for the reason and upon the ground that said finding is without support in the evidence and for the further reason that said finding is a conclusion of law.

2. Object to finding of fact No. 2, for the reason and upon the ground that said finding is without support in the evidence and for the further reason that said finding is a conclusion of law.

3. Object to finding of fact No. 3, for the reason and upon the ground that said finding is without support in the evidence, for the further reason that said finding is a conclusion of law, and for the further reason that said finding is mere conjecture and speculation.

4. Object to conclusion of law No. 1, for the reason and upon the ground that the same is contrary to law and the evidence.

5. Object to conclusion of law No. 2, for the

reason and upon the grounds that the same is contrary to law and the evidence.

KRAMER, MORRISON,
ROCHE & PERRY,
Attorneys for Plaintiffs.

By /s/ BURR SUTTER.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1949.

[Title of District Court and Cause.]

PLAINTIFFS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial, before the court, sitting without a jury, on the first day of March, 1949, the plaintiffs being represented by Messrs. Kramer, Morrison, Roche & Perry, by Burr Sutter, and defendant being represented by Messrs. Cunningham, Carson, Messinger and Carson, by Charles A. Carson and Charles A. Carson III and the court, having heard the evidence and the matter having been submitted for decision, the court, being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

The plaintiffs, L. F. Corrigan and Clara R. Corrigan, are husband and wife, and are now and were

at all times pertinent to this proceeding citizens and residents of the State of Texas. The General Insurance Company of America is now, and was at all times pertinent to this proceeding, a corporation duly organized and existing under the laws of the State of Washington, having its principal place of business in the City of Seattle, in said state, and duly authorized and licensed to transact its insurance business within the State of Arizona. The defendant, San Marcos Hotel Company is, and was at all times pertinent to these proceedings, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and the defendant is and was the owner and operator of the San Marcos Hotel at Chandler, Arizona.

II.

That the amount in controversy exceeds the sum of three thousand dollars (\$3,000.00), exclusive of interest and costs.

III.

That on the 17th day of March, 1947, General Insurance Company of America issued to plaintiffs, L. F. Corrigan and Clara R. Corrigan, a certain policy of insurance whereby said company agreed to indemnify said plaintiffs for a term commencing the 17th day of March, 1947 and expiring the 17th day of March, 1950, against damage to or loss by theft of personal property described therein not in excess of the sum of forty thousand dollars (\$40,000.00). That among other things, the personal property covered by said policy was a certain full

length natural wild mink fur coat, belonging to the insureds, the scheduled value of which was seven thousand dollars (\$7,000.00) and the actual value thereof approximately ten thousand dollars (\$10,000.00).

IV.

That on February 15, 1948, while the plaintiffs were guests of defendant in its hotel at Chandler, Arizona, plaintiff Clara R. Corrigan placed and left said mink coat under the care of said defendant, by leaving the same in the ladies' powder room adjacent to the dining room of said hotel, said powder room being maintained by defendant and intended by defendant for the use of its guests as a place to leave their coats and other belongings while using the facilities of the dining room and hotel. That on said date, while said mink coat was under the care of defendant, said mink coat was stolen, and it was not, and has not been, recovered.

V.

That at said time and place the plaintiff, Clara R. Corrigan, acted as a reasonably prudent person, under the circumstances.

VI.

That said policy of insurance aforesaid contained the provision that General Insurance Company of America, upon payment of loss or damage under said policy, should be legally subrogated to all rights and causes of action of said L. F. Corrigan and Clara R. Corrigan, to the extent of the payment

made under said policy. That claim was duly filed by plaintiffs under said policy in the sum of seven thousand dollars (\$7,000.00), which sum was paid by said insurance company to plaintiffs, who executed in favor of said insurance company articles of subrogation in said amount.

VII.

That plaintiffs, L. F. Corrigan and Clara R. Corrigan, upon demand of said General Insurance Company of America, as provided in said policy of insurance, brought this action for and on behalf of said insurance company, under its right of subrogation aforesaid.

Conclusions of Law

I.

That this action is controlled by the provisions of Section 62-304, Arizona Code Annotated 1939.

II.

That the loss involved herein was not occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the plaintiffs, or either of them, or by the act of someone brought into the hotel by the plaintiffs, or either of them.

III.

That plaintiffs are entitled to recover from defendant for the loss of said fur coat the sum of seven thousand dollars (\$7,000.00) for the use and benefit of General Insurance Company of America,

and for plaintiffs' costs herein incurred and expended.

Dated this day of March, 1949.

.....,

Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial before the Court, sitting without a jury, on the 1st day of March, 1949, the Plaintiffs being represented by Messrs. Kramer, Morrison, Roche & Perry by Burr Sutter, and Defendant being represented by Messrs. Cunningham, Carson, Messinger & Carson by Charles A. Carson and C. A. Carson, III, and the Court having heard the evidence and the matter having been submitted for decision, the Court being fully advised in the premises makes the following findings of fact and conclusions of law, to-wit:

Findings of Fact

1. The Plaintiffs, L. F. Corrigan and Clara R. Corrigan are husband and wife, and are now and at all times were, pertinent to this proceeding, citizens

and residents of the State of Texas. The General Insurance Company of America is now and was at all times pertinent to this proceeding a corporation duly organized and existing under the laws of the State of Washington, having its principal place of business in the City of Seattle, in said State, and was duly authorized and licensed to transact its insurance business in the State of Arizona. The Defendant, San Marcos Hotel Company, is and was at all times pertinent to this proceeding a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and the Defendant is and was the owner and operator of the San Marcos Hotel at Chandler, Arizona.

2. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

3. On the 17th day of March, 1947, General Insurance Company of America issued to Plaintiffs, L. F. Corrigan and Clara R. Corrigan, a certain policy of insurance whereby said Company agreed to indemnify said Plaintiffs for a term commencing the 17th day of March, 1947, and expiring the 17th day of March, 1950, against damage to or loss by theft of personal property described therein not in excess of the sum of Forty Thousand Dollars (\$40,000.00). That among other things, the personal property covered by said policy was a certain full-length natural wild Mink fur coat, belonging to the insureds, the scheduled value of which was Seven Thousand Dollars (\$7,000.00) and the actual value

of which was approximately Ten Thousand Dollars (\$10,000.00).

4. Plaintiff Clara R. Corrigan, while a guest at the San Marcos Hotel at Chandler, Arizona, on or about February 15, 1948, had and retained in her personal and exclusive custody and control a certain Mink fur coat of the value of approximately Seven Thousand Dollars (\$7,000.00).

5. At or about the hour of 7:15 o'clock in the evening of said 15th day of February, 1948, Plaintiff Clara R. Corrigan placed said fur coat in the public powder room near the entrance to the public dining room in said San Marcos Hotel upon a hanger which she suspended from an eighty-four inch (84") rack belonging to Defendant.

6. There was, at said time, a sign on the inside wall of said powder room to the left of the door, which sign is seven and one-half inches ($7\frac{1}{2}$ ") by four inches (4") in size and upon which was printed: "Not Responsible for Articles Left Here—Signed—San Marcos." Said sign is so situated and is of such prominence that any person habitually using said powder room must have seen the sign, and Plaintiff Clara R. Corrigan did see said sign prior to February 15, 1948.

7. Said powder room is in the public part of said hotel, being on the East side of a short hallway leading South from the public lobby of said hotel to the public dining room operated by Defendant.

8. No attendant was at any time, including said 15th day of February, 1948, on duty in said public

powder room to guard any articles left there, or in any other capacity, as was well known to Plaintiff Clara R. Corrigan.

9. Access to said powder room may be had either through the public lobby, the public dining room or the kitchens of said San Marcos Hotel, as was known to said Plaintiff Clara R. Corrigan.

10. Defendant, through its employees, prior to February 15, 1948, had verbally warned the Plaintiff Clara R. Corrigan and other guests that said public powder room was not a safe place to leave valuable articles.

11. Plaintiff Clara R. Corrigan, on said 15th day of February, 1948, did not inform any officer or employee of Defendant that she had placed or intended to place said fur coat in said powder room, nor had she ever informed Defendant that she was in the habit of so doing.

12. After her meal on said day, Plaintiff Clara R. Corrigan went directly from said public dining room to said public lobby, where she remained until approximately 10:15 or 10:30 o'clock in the evening of said day, conversing and participating in games with other guests of the hotel.

13. There were, throughout said evening, as Plaintiff well knew, many visitors at said hotel and in said public dining room and lobby who were not guests of said hotel and none of whom were known to Plaintiff. Said Plaintiff did not, after leaving said fur coat in the powder room, return there or check as to the whereabouts or safety of said coat

until approximately 10:15 o'clock on said evening, nor did she take any notice of the numerous fur coats which were worn or carried out of said public lobby by guests and strangers.

14. There were, on February 15, 1948, facilities provided by Defendant behind the hotel desk for the safekeeping of the property of guests at the San Marcos Hotel, as was known to Plaintiff Clara R. Corrigan.

15. Plaintiff Clara R. Corrigan did not use ordinary or reasonable care in the safekeeping of her fur coat on said day.

16. At approximately 10:15 or 10:30 o'clock on said evening, Plaintiff Clara R. Corrigan returned to the powder room and was unable to find her coat. Said coat had not been recovered by or restored to Plaintiffs Corrigan prior to the trial of this cause.

17. The proximate cause of the loss of Plaintiff Clara R. Corrigan's coat was the negligence of said Plaintiff, and said loss would not have occurred without such negligence.

18. General Insurance Company of America, under its said policy of insurance, issued to Plaintiffs Corrigan, was bound to and did pay said Plaintiffs Corrigan the sum of Seven Thousand Dollars (\$7,000.00) on account of the loss of said fur coat, and was entitled to be, and was, subrogated to any claims of Plaintiffs Corrigan against Defendant on account of such loss. That Plaintiffs Corrigan brought this action for and on behalf of said insur-

ance company under its right of subrogation, as aforesaid.

Conclusions of Law

1. That Plaintiff Clara R. Corrigan was negligent in caring for the fur coat which was lost and to recover for the loss of which this action was instituted, and that the proximate cause of such loss was the negligence of said Plaintiff Clara R. Corrigan.

2. That the loss of said fur coat would not have occurred had Plaintiff Clara R. Corrigan exercised ordinary care in its safekeeping.

3. That Plaintiffs are not entitled to recover from Defendant for the loss of said fur coat, and that Defendant is entitled to judgment against the Plaintiffs on their Complaint, and for Defendant's costs incurred herein.

Dated: This 8th day of July, 1949.

/s/ DAVE W. LING,
Judge.

[Endorsed]: Filed July 8, 1949.

In the United States District Court
for the District of Arizona

No. Civ-1211-Phx.

L. F. CORRIGAN and CLARA R. CORRIGAN,
who sue on behalf of General Insurance Com-
pany of America, a corporation,
Plaintiffs,

vs.

SAN MARCOS HOTEL COMPANY, a corpora-
tion,
Defendant.

JUDGMENT

The above-entitled action having come on regularly for trial before the Court sitting without a jury on March 1, 1949, plaintiffs being represented by Messrs. Kramer, Morrison, Roche & Perry by Burr Sutter, and defendant being represented by Messrs. Cunningham, Carson, Messinger & Carson by Charles A. Carson and C. A. Carson, III, and the Court having heard the evidence and arguments of counsel and having heretofore filed herein its written memorandum of decision and its written findings of fact and conclusions of law, to which reference is hereby made,

It Is, Therefore, Ordered, Adjudged And Decreed that plaintiffs take nothing by their complaint herein; that this action be and it hereby is dismissed on the merits with prejudice; that defendant have

and recover from plaintiffs its costs incurred in this action; and that defendant have execution thereof.

Done In Open Court this 8th day of July, 1949.

/s/ DAVE W. LING,

Judge.

[Endorsed]: Filed July 8, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the platintiffs in the above entitled action and move the Court for a new trial herein on the following grounds:

1. The judgment entered herein is contrary to the evidence submitted.
2. The judgment entered herein is contrary to the law.

KRAMER, MORRISON, ROCHE
& PERRY,

By /s/ BURR SUTTER,

Attorneys for Plaintiffs.

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

In this memorandum references to the Reporter's Transcript will be made by the letters R. T. followed by the page number, and references to the deposi-

tion of Clara R. Corrigan will be made by the word "Dep." followed by the page number.

The uncontradicted evidence in this case shows that the defendant San Marcos Hotel Company provided a ladies' powder room in the hotel as a place where lady guests might leave their coats while using the hotel facilities (R. T. 4), and there is no question that the powder room was designed for that purpose and used for that purpose.

The plaintiff Clara R. Corrigan, together with her husband, had visited the hotel over a period of seven years (Dep. 29), during which time the powder room was the only place provided by the hotel in which the ladies could leave their coats while in the dining room (Dep. 31), and it was the custom over the years for the ladies to leave their coats in that place (Dep. 8, 9, 31 and 32).

On the occasion in question Mrs. Corrigan had placed her coat in the powder room, at which time there were approximately 200 other coats there, many of which were furs (Dep. 19), and a number of other expensive coats were left in the powder room (Dep. 20). When Mrs. Corrigan returned to secure her coat there were approximately 25 ladies' coats remaining in the powder room (Dep. 19).

This action is governed by the provisions of Section 62-304, Arizona Code Annotated, 1939, the pertinent part of which reads as follows:

"An innkeeper is liable for all losses of, or injuries to, personal property left or placed by his guests under his care, unless occasioned by an ir-

resistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one brought into the inn by the guest.”

The Court in its memorandum opinion and in the findings of fact found that the innkeeper was exempt from liability because Mrs. Corrigan was negligent in the care of her coat. This finding is not sustained by the law or the evidence.

The general question of negligence has been defined by the Supreme Court of Arizona in the case of Southern Pacific Co. vs. Buntin, 54 Ariz. 180, 94 Pac. 2d 639, as follows:

“‘. . . negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually regulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man, guided by those same considerations would not do; it is not intrinsic or absolute, but is always relative to the surrounding circumstances of time, place and persons.’ ”

In determining whether or not Mrs. Corrigan was negligent, we cannot be governed solely by the value of the coat which was stolen, but must refer to all the surrounding circumstances of time, place and persons. This loss occurred at an expensive resort hotel which was frequented by people of means. The place of the loss was the hotel powder room which was maintained as a place for ladies to leave their coats, and it was used for this purpose by Mrs. Corrigan. It was unquestionably the custom for the

ladies who were guests of the hotel to leave their coats in this place, and it can hardly be said that Mrs. Corrigan was negligent in following this custom of many years standing by leaving her coat in the place designated for that purpose. If she was negligent on this occasion, so were approximately two hundred other ladies who had also left their coats, including many valuable furs, in the powder room. Certinly Mrs. Corrigan acted as a reasonably prudent person would have acted under the circumstances.

In the case of Maxwell Operating Co. vs. Harper, 138 Tenn. 640, 200 S. W. 515, the plaintiff, who was a guest of the defendant hotel, placed his overcoat in the hotel check room and received a check from the attendant on which was printed: "Left at owner's risk. The management will not be responsible for loss or damage." The overcoat was stolen from the hotel check room. The court held that a hotel cannot limit its liability in the manner attempted, and further held that a hotel which provides a check room invites its use and will be responsible for any articles stolen from the check room.

There was no duty on the part of Mrs. Corrigan to notify the hotel that she was leaving her coat in the powder room, since the hotel was bound to know that guests would leave their coats in this place.

In Swanner vs. Conner Hotel Co., 224 S. W. 123, a guest who desired to register at the hotel left his luggage in the lobby since his room was not ready.

It was stolen, and the hotel company was held liable for the loss even though the attention of the innkeeper was not called to the luggage when it was left by the owner.

In *Keith vs. Atkinson*, 48 Colo. 480, 111 Pac. 55, 139 Am. St. Rep. 284, it was held that a guest of a hotel has the right to rely upon prevailing customs and that the innkeeper is bound thereby.

Therefore, Mrs. Corrigan could not have been negligent in placing her coat in a place customarily used for that purpose.

Respectfully submitted,

KRAMER, MORRISON,

ROCHE & PERRY.

By /s/ BURR SUTTER.

[Endorsed]: Filed July 18, 1949.

In the United States District Court
for the District of Arizona

Civ-1211

October 1949 Term
MINUTE ENTRY OF
MONDAY, OCTOBER 3, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

L. F. CORRIGAN, et ux,

Plaintiffs,

vs.

SAN MARCOS HOTEL COMPANY,

Defendant.

Plaintiffs' Motion for New Trial comes on regularly for hearing this day. Burr Sutter, Esquire, appears as counsel for the plaintiffs. Charles A. Carson III, Esquire, appears as counsel for the defendant.

Plaintiffs' Motion for New Trial is now argued by respective counsel.

It Is Ordered that said Motion for New Trial be and it is denied.

(Docketed Oct. 3, 1949.)

[Title of District Court and Cause.]

PLAINTIFFS' NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Arizona rendered and entered July 8, 1949 and from the whole of said judgment, and from the order of said District Court entered October 2, 1949 denying the plaintiffs' motion for new trial.

KRAMER, MORRISON,

ROCHE & PERRY,

By /s/ ALLAN K. PERRY,

Attorneys for Plaintiffs.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, L. F. Corrigan and Clara R. Corrigan, who sue on behalf of General Insurance Company of America, a corporation, the plaintiffs in the above numbered and entitled action, as principal obligors, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to become and be sole surety upon bonds

required in the courts of the United States, as surety, are held and firmly bound unto San Marcos Hotel Company, an Arizona corporation, the defendant above named, in the penal sum of Two Hundred Fifty Dollars (\$250), for the payment of which said sum well and truly to be made said principal obligors and the corporation in whose behalf they sue and the said surety bind themselves and their respective heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such that,

Whereas, under date of July 8, 1949 a judgment was rendered and entered in the above numbered and entitled action in favor of the defendant above named, and against said plaintiffs, and thereafter and on the 2nd day of October, 1949 an order was entered in said court and cause, denying said plaintiffs' motion for new trial, and the principal obligors herein have appealed to the United States Court of Appeals for the Ninth Circuit from said judgment and said order.

Therefore, if the said principal obligors shall pay the costs that may be assessed against them if said appeal is dismissed or the judgment appealed from affirmed, or such costs as the appellate court may award if the order appealed from is modified, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

Witness the hands of the principal obligors, by their duly authorized attorney, and the corporate

name and seal of the surety, by its duly authorized attorney-in-fact, this 28th day of October, 1949.

L. F. CORRIGAN and

CLARA R. CORRIGAN,

who sue on behalf of General Insurance Company of America, a corporation.

By /s/ ALLAN K. PERRY,

Their Attorney.

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND,

[Seal]: By /s/ C. A. DUMMOND,

Its Attorney-in-Fact.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINT UPON WHICH
PLAINTIFFS INTEND TO RELY UPON
THEIR APPEAL

The plaintiffs above named, who, concurrently with the filing of this statement, have perfected an appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Arizona, entered July 8, 1949, and the order of said District Court denying said plaintiffs' motion for new trial, entered October 2, 1949, intend to rely upon the following point upon their appeal to said United States Court of Appeals, viz:

All of the evidence in the cause, taken in the

light most favorable to the defendant, fails to disclose any negligence upon the part of the plaintiffs, or any one or more of them, that would excuse the defendant from the liability imposed upon it as an innkeeper under Section 62-304 of the Arizona Code of 1939.

KRAMER, MORRISON,
ROCHE & PERRY,
By /s/ ALLAN K. PERRY,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The plaintiffs above named hereby designate the following portions of the record to be certified and transmitted to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint filed July 16, 1948.
2. Answer filed August 9, 1948.
3. Plaintiffs' Exhibit No. 1 in evidence (deposition of Clara R. Corrigan) filed March 1, 1949.
4. Plaintiffs' Exhibit No. 2 in evidence (deposition of L. F. Corrigan) filed March 1, 1949.
5. Plaintiffs' Exhibit No. 3 in evidence (insurance policy) filed March 1, 1949.
6. Plaintiffs' Exhibit No. 4 in evidence (proof of loss) filed March 1, 1949.

7. Defendant's proposed findings of fact and conclusions of law filed March 21, 1949.

8. Plaintiffs' objections to proposed findings of fact and conclusions of law filed March 22, 1949.

9. Plaintiffs' proposed findings of fact and conclusions of law filed March 22, 1949.

10. Findings of fact and conclusions of law filed July 8, 1949.

11. Judgment filed July 8, 1949.

12. Reporter's transcript filed July 18, 1949.

13. Plaintiffs' motion for new trial filed July 18, 1949.

14. All minute orders entered by the Clerk in the above entitled cause, on or subsequent to March 1, 1949.

15. Plaintiffs' notice of appeal filed concurrently herewith.

16. Bond on appeal filed concurrently herewith.

17. Statement of point upon which the plaintiffs intend to rely, upon their appeal filed concurrently herewith.

18. This designation.

KRAMER, MORRISON,

ROCHE & PERRY,

Attorneys for Plaintiffs.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed October 28, 1949.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

The above numbered and entitled cause came on duly and regularly to be heard in the above entitled court before the Honorable Dave W. Ling, Judge, presiding without a jury, commencing at 10:00 o'clock a.m., on the 1st day of March, 1949, at Phoenix, Arizona.

The plaintiffs were represented by their attorney, Mr. Burr Sutter, of Messrs. Kramer, Morrison, Roche & Perry, attorneys at law, Phoenix, Arizona.

The defendant was represented by its attorney, Mr. Charles A. Carson III, of Messrs. Cunningham & Carson, attorneys at law, Phoenix, Arizona.

The following proceedings were had:

The Clerk: Civil 1211, Phoenix, L. F. Corrigan and Clara R. Corrigan, who sue on behalf of General Insurance Company of America, a corporation, plaintiff, versus San Marcos Hotel Company, a corporation, for trial.

The Court: Are you ready?

Mr. Sutter: The plaintiffs are ready, your Honor.

Mr. Carson: The defendant is ready, your Honor.

Mr. Sutter: I don't believe I appear as attorney of record in the case yet. I have recently become associated with the firm of the plaintiffs' attorneys, and I'd like to enter my appearance as one of the attorneys for the plaintiffs.

The Court: Very well. All right, call your first witness.

Mr. Sutter: I'd like to call Mr. John Quarte for cross-examination.

JOHN QUARTE

was called as a witness by the plaintiffs for cross-examination under the Statute, and being first duly sworn, testified as follows:

Cross-Examination

By Mr. Sutter:

Q. Your name is John Quarte? [2*]

A. That is right.

Q. And what official connection, if any, do you have with the San Marcos Hotel, Mr. Quarte?

A. At present, General Manager.

Q. General Manager? A. Yes, sir.

Q. How long have you been in that capacity?

A. Six years.

Q. Are you acquainted with Clara R. Corrigan and L. F. Corrigan, the plaintiffs?

A. Yes, sir.

Q. How long have you known the Corrigans?

A. Four years, I believe, four or five years.

Q. During that period of time have they been guests on occasions at the San Marcos Hotel at Chandler? A. Yes.

Q. Were they guests at that hotel during the Winter season of '48? A. That is right.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of John Quarte.)

Q. Do you recall approximately for what period they were staying there?

A. I believe they were there from the 4th of February until the 1st of March of——

Q. Not quite a month?

A. Yes, not quite a month. [3]

Q. But they were guests at the hotel on the 15th of February, 1948? A. That is right.

Q. Mr. Quarte, in connection with the hotel, there is a dining room operated, is there not?

A. That is right.

Q. Does the Hotel provide any facilities for the use by patrons of the dining room and guests of the hotel that use the dining room in the way of a place for guests to leave wraps?

A. We have a room connected with the ladies' powder room where guests choose to leave their wraps on occasions.

Q. In the ladies' powder room are there any facilities particularly designed for that purpose?

A. There is a coat rack there for those wishing to leave their wraps or things.

Q. Is that a long horizontal bar on a stand?

A. Yes, it is about seven feet wide—long, I should say.

Q. On that did you have individual coat hangers for the use of the guests? A. Yes.

Q. Do you know whether or not anything out of the ordinary occurred on the evening of February 15th, 1948, with respect to Mrs. Corrigan and any of her personal belongings?

(Testimony of John Quarte.)

A. I was notified by Mrs. Hicks, who is here, our Social Hostess. I was at the movies that evening and she sent one of the boys down to get me, and when I arrived at the hotel, it was just a block and a half away, or a block away, I was notified that Mrs. Corrigan's coat was missing.

Q. You were not present at the hotel at the time? A. No, I was not.

Q. Has a demand been made upon you or the hotel for the payment of the value of the coat?

A. No.

Q. Did you receive——

A. Wait a minute, by who?

Q. By the General Insurance Company of America. A. No, they have not.

Q. Did you receive a letter last summer from the law firm of Kramer, Morrison, Roche & Perry in which demand was made upon you?

A. I believe that was done through Mr. Carson. Did I get a copy of that? My attorneys——

Q. The letter was dated June 25th, 1948, in which the law firm that I just mentioned stated they represented the General Insurance Company?

A. Yes.

Q. And I believe in that letter a demand was [5] made for \$7000? A. I don't recall the figure.

Q. Has anything been paid as the result of that demand? A. No.

Q. The hotel has paid nothing?

A. Nothing.

(Testimony of John Quarte.)

Q. Are Mr. and Mrs. Corrigan by any chance, guests at your hotel at the present time?

A. They left last Sunday.

Q. Do you know where they went?

A. I believe they went back to Dallas, but I am not sure.

Mr. Sutter: That is all.

The Witness: Thank you.

Mr. Sutter: At this time, if the Court please, I'd like to offer the depositions of L. F. Corrigan and Clara R. Corrigan, the original of which has been filed with the Court. I'd also like to offer in evidence the two exhibits which are attached to the deposition, being Plaintiff's Exhibits A and B for identification for the purpose of the deposition.

Mr. Carson: Could we have those offers made separately so we might have a chance to object to the use of the deposition? [6]

The Court: All right.

Mr. Sutter: Well, at this time we will offer the depositions now and Mr. Carson can state his objections if he has any.

Mr. Carson: If the Court please, we object to the use of the deposition at this trial, upon the grounds that it is not—it does not comply with the requirements of the Federal Rules of Civil Procedure for the use of depositions. I might state specifically that Rule 26-D relating to the use of depositions at the trial, provides that upon—that at

a trial or upon the hearing, a deposition, so far as admissible under the rules of evidence, may be used in accordance with any one of the following provisions: In Subdivision 1 it provides for use in contradicting or impeaching testimony of deponent as a witness, which does not apply here. Subdivision 2 is the use of a deposition of an adverse party, which does not apply here. This deposition is being offered by the plaintiffs, and is the plaintiffs' deposition. Subdivision 3 is the one which would apply here, and is to the effect that a deposition, whether or not a party, may be used by any party for any purpose if the Court finds; 1. That the witness is dead, which is not the case; 2. That the witness is at a [7] greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

In this case we don't know where the plaintiffs are, assuming they are in Dallas, there is no showing as to any necessity for their being there, and they went there of their own free will, and are now offering their own deposition, and there is a provision for the use when the witness is unable to testify because of age, sickness, infirmity or imprisonment, or that the party offering the deposition has been unable to procure attendance of the witness, or upon application and notice that such exceptional circumstances exist as make it desirable in the interest of justice and with due regard to the

importance of presenting the testimony of witnesses orally in open court, to allow the depositions to be used. There is no showing here of any exceptional circumstances.

As I stated, the parties offering their own deposition through their attorney were, as testified by Mr. Quarte, in Maricopa County, Arizona, until Sunday, when they left. For what purpose and for what destination, we don't know, but certainly their absence has been procured by [8] themselves and there is no showing of any exceptional circumstances to justify their procuring their own absence and then presenting their deposition, and for that reason we believe the depositions of Clara R. Corrigan and L. F. Corrigan, as offered by their attorneys, cannot be used in the trial of this cause. There is no exception in this 26-D and no provision for any use of a deposition.

Mr. Sutter: I'd like to briefly state that according to Mr. Quarte the Corriganes left Sunday to return to their home in Dallas, Texas, and in the deposition itself it appears that they were going back to Dallas, Texas, and are there at this time.

The Court: When was the deposition taken?

Mr. Sutter: It was taken on the 23d of February, your Honor, and that was the reason the deposition was taken, because they were going to be unavailable for trial. As far as any objection to the use of the deposition is concerned, I can't see where the defendant could be at all hurt by the use of the deposition in this case. They had full and free opportunity to cross-examine at the time the

depositions were taken, and used that right and privilege to the utmost, as the Court will observe.

The Court: I will admit the depositions subject to the objection.

Mr. Sutter: I'd also at this time like to offer the exhibit attached to the deposition as Plaintiffs' Exhibit A, which is a copy of the policy of insurance in question here.

The Court: Any objection to that?

Mr. Carson: No objection.

Mr. Sutter: And I'd like to offer also the exhibit attached to the deposition as Plaintiffs' Exhibit B for identification, which is a proof of loss signed by Mr. L. F. Corrigan and identified by him as such in his deposition.

The Court: All right, they may be received.

(Thereupon the documents were marked as Plaintiffs' Exhibits 1, 2, 3 and 4 in evidence.)

Mr. Sutter: The plaintiffs rest.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the plaintiffs and the defendant in the above entitled cause, acting through their respective attorneys, that the depositions of L. F. Corrigan and Clara R. Corrigan, plaintiffs in said cause, may be taken in their own behalf before Stanley Martin, a Notary Public in and for the County of Maricopa, State of Arizona, on Wednesday, the 23rd day of February, 1949, com-

mening at 2:30 o'clock p.m. of said day in the law offices of Kramer, Morrison, Roche and Perry, Suite 309, First National Bank Building, Phoenix, Arizona.

It is further stipulated that the signing of the depositions by the respective witnesses is hereby waived.

Dated this 23rd day of February, 1949, at Phoenix, Arizona.

KRAMER, MORRISON,
ROCHE & PERRY,

By /s/ BURR SUTTER,

Attorneys for Plaintiffs.

CUNNINGHAM, CARSON,
MESSINGER & CARSON,

By /s/ C. A. CARSON, III,

Attorneys for Defendant.

PLAINTIFFS' EXHIBIT NO. 1

Deposition of Clara R. Corrigan

Pursuant to the annexed stipulation, the depositions of Clara R. Corrigan and L. F. Corrigan were taken in their own behalf before Stanley Martin, a Notary Public in and for the County of Maricopa, State of Arizona, on Wednesday the 23rd day of February, 1949, commencing at 2:30 o'clock p.m. of said day in the law offices of Kramer, Morrison, Roche and Perry, Suite 309, First National Bank Building, Phoenix, Arizona.

Plaintiffs' Exhibit No. 1—(Continued)
(Déposition of Clara R. Corrigan.)

The plaintiffs were present and represented by their attorneys Kramer, Morrison, Roche and Perry, by Mr. Burr Sutter. The defendant was represented by its attorneys Cunningham, Carson, [*1] Messenger and Carson, by Mr. C. A. Carson, III.

Thereupon, the following proceedings were had:

Mr. Carson: In order that there may be no possibility of later misunderstanding I consider it advisable to state the position of the defendant San Marcos Hotel with reference to the taking of these depositions of the plaintiffs, Mr. and Mrs. Corrigan. It should be understood that our presence here means nothing more than that we have waived the requirements of formal notice and formal granting of leave for the taking of these depositions. And it does not mean that we waive any of our rights to the benefits of the rules of civil procedure with reference to the taking of depositions, but on the contrary we reserve every right we have to object to the use of all or any part of either of these depositions at the trial of this cause.

CLARA R. CORRIGAN

being first duly sworn to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Sutter:

.Q Your name is Clara R. Corrigan?

* Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

A. Yes.

Q. And where is your permanent address? [2]

A. Dallas, Texas.

Q. What is the address?

A. 4404 Versailles.

Q. During the winter season of 1948 I believe that you and Mr. Corrigan were guests at the San Marcos Hotel in Chandler, Arizona?

A. Yes, sir.

Q. Approximately what time did you arrive at the San Marcos?

A. Well, approximately the last day of January.

Q. How long did you remain there?

A. Through the month—through the month of February.

Q. And were you paying guests at the hotel?

A. Yes.

Q. Did you pay the regular rates?

R. Yes, sir.

Q. Charged by the hotel. On or about the 15th day of February, 1948, did anything unusual occur as far as any of your personal belongings were concerned?

A. Am I to relate the whole thing now or just answer your question?

Q. Just answer the question?

A. I went into the San Marcos dining room between seven-fifteen and seven-thirty on February 15th in the evening and had dinner with some friends. They came by for me and I went with

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

them. We went into the ladies' room and I hung up my coat along with the friend. We went in and had dinner; came back into the lounge. And I would say it was around ten to ten-fifteen, Mr. Corrigan being out of town, they said to me, "We will walk home with you." so we went in to get our coats and my coat was gone.

Q. Were you staying in the hotel proper or in one of the cottages at the——

A. In one of the cottages.

Q. And what day of the week was that day, do you recall? A. It was Sunday.

Q. And when you placed your coat in the ladies' room were there other coats there?

A. Oh, yes, many.

Q. There were many other coats?

A. Yes, and many fur coats.

Q. Was there a place particularly designed for the hanging of coats in that room?

A. Yes. To the right of the lounge there is a regular open coat hanger.

Q. And did they have individual coat hangers?

A. Yes. [4]

Q. Hanging on that?

A. Yes, regular coat hangers. I had put mine on the coat hanger.

Q. Had you done that on previous occasions?

A. Yes.

Q. Did you do it on every occasion when you wore your coat to the dining room?

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

A. Yes, I always hung it right there and always put it on the hanger.

Q. On these other occasions were there numerous coats there also? A. Yes.

Q. What type coat was this, Mrs. Corrigan?

A. It was a full length Canadian mink, wild mink.

Q. What color?

A. Well, natural. It was a natural wild mink—what is known as natural wild mink.

Q. How long had you had the coat?

A. Approximately two years. I wouldn't be—just a little more or less.

Q. Do you happen to know what the value of that coat was at the time that it was stolen?

A. Well, I would say that—I had asked the question, if that means anything, and it was worth anywhere between eight and ten thousand dollars on [5] the market at that time.

Q. A minimum of eight thousand dollars and maximum of ten thousand dollars, in that range?

A. Yes.

Q. Would it be the market value of the coat?

A. Yes.

Q. Was the coat ever returned to you?

A. No.

Q. Did you have insurance on the coat?

A. Yes.

Q. And was the insurance policy on the coat alone or was it a general personal property floater

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

policy on all your personal belongings?

A. Well, now, that I can't answer. I know that there was a special designation on the coat.

Q. Was there a claim filed with the insurance company? A. Yes.

Q. And for what amount?

A. Seven thousand dollars.

Q. Was that claim paid by the company?

A. Yes.

Q. Approximately when did the company make that payment?

A. Well, let me see—I would say the middle of the summer. About the latter part of July, I [6] would say. I really don't know.

Q. Well, that is close enough. Do you know the name of the insurance company, Mrs. Corrigan?

A. General.

Q. General Insurance Company of America?

A. Yes.

Mr. Sutter: I believe that is all.

Cross-Examination

By Mr. Carson:

Q. Mrs. Corrigan, what accommodations did you occupy at the hotel during the 1948 season?

A. We occupied one bedroom in the center of the orange grove. Orange Grove Avenue as we call it, and we had a bedroom, dressing room and bath, private entrance.

Q. Do you remember the designation of that particular accommodation?

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

A. You mean the number?

Q. The number? A. 11B.

Q. Did you ordinarily keep this coat in your accommodation, in the dressing room or bedroom?

A. Yes.

Q. Had you ever turned it over to any employee or representative of the hotel? A. Never. [7]

Q. Did you at all times keep the coat in your own exclusive custody?

A. Yes. Other than when I would take it to the—would leave it in the cloakroom or the ladies' room.

Q. The coat in other words was always under your direct personal and exclusive control?

A. Yes.

Q. And did you ever leave in other places in the hotel besides in the—— A. No.

Q. Powder room?

A. No. Other than in my own room. Often times I wore it into the lounge but it would be around my shoulders. I never left it.

Q. Did you ever take it off in the lounge?

A. I imagine I did, but I never left it.

Q. Did anybody at the hotel, any representative of the hotel ever attempt to tell you what you should do with your coat?

A. Well, no, not that I can remember.

Q. You did then just as you pleased with it?

A. Well, it was a custom—we have been going

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

there many years. It was a custom; that was the place the ladies left their coats.

Q. I understand. You did with your coat [8] whatever you pleased. Whatever you yourself decided to do with the coat you did without any direction from any person at the hotel, is that right?

A. I am not sure that I understand your question.

Q. Your coat was worn or placed somewhere at your own discretion however you saw fit to wear it or wherever you saw fit to leave it was what was done with the coat at all times?

A. I wouldn't say wherever I saw fit to leave it. I would say that I left it in the customary place.

Q. If you had wanted to leave it on a chair in the lounge, you would have done that?

A. That would have been my privilege, yes.

Q. In other words, the coat was yours to do with and you did do as you saw fit? A. Sure.

Q. The powder room is to the left of the hallway leading into the dining room as you enter the dining room? A. Yes, to the left.

Q. And is that a large room there?

A. Well, I would say it was approximately the size of this room. Maybe a little bit longer than this room. [9]

Q. Possibly fifteen by twenty feet?

A. I guess so. I am not very good on sizes, approximately.

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

Q. Assuming, Mrs. Corrigan, that as you walk into the dining room from the main lobby of the hotel that you are walking south, and you turn in to the powder room, on your left is this rack to which you have referred against the south wall?

A. It is to the right, yes.

Q. Of the powder room? A. Yes.

Q. Is there an attendant in the powder room?

A. No.

Q. Had you noticed a sign, or have you noticed during your stay at the hotel a sign to the effect that the hotel will not be responsible for wraps and other articles left in the powder room?

A. Not in the powder room.

Q. There is no sign?

A. Not that I recall.

Q. Just to refresh your recollection is there not a sign approximately eight by six inches against the west wall of the powder room to the left of the door as you leave the powder room?

A. Wait a minute now. To the west?

Q. In other words, to the left of the powder [10] room door as you leave the powder room on the wall approximately seven feet from the floor is there not a sign to the effect that the hotel is not responsible for articles or wraps left there?

A. I do not recall the sign. There is a sign somewhere, but I do not recall where it is.

Q. You are not sure whether it is in the powder room? A. No, I really am not.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. It might be there or it might not?

A. It might be there or might not.

Q. Where did you store your luggage while you were a guest at the hotel?

A. In my cottage.

Q. You kept it in your cottage? A. Yes.

Q. Did you ever check any articles with the hotel? A. No.

Q. You at all times kept them in your room or wherever you were? A. Yes.

Q. You say you had owned this coat approximately two years before it was lost?

A. Approximately two years.

Q. And for what price did you purchase the coat? [11]

A. Well, that I can't answer. My husband bought my coat. I have no idea.

Q. Do you know from whom it was purchased?

A. Yes.

Q. From whom was it purchased?

A. Solomon of New York, M. Solomon.

Q. M. Solomon? A. Yes.

Q. A New York furrier?

A. A New York furrier.

Q. Do you know the serial number of that—of the pelts in that coat? A. No.

Q. Have you a record—

A. I am sure we have it, yes.

Q. The record would be at your home in Dallas?

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

A. Yes. The serial number could be obtained from one of the department stores where my coat was stored.

Q. It was customary for you to store your coat during certain seasons of the year? A. Yes.

Q. Are you familiar with the general values of furs, valuable furs such as were in this coat?

A. Yes.

Q. You have appraised them generally? [12]

A. You mean would I recognize coat value or pelts?

Q. Yes? A. Yes, I would.

Q. On this particular night February 15, 1948, what time did you leave your accommodations known as 11B in the bungalow section of the hotel?

A. I would say around seven-fifteen to seven-twenty.

Q. Did you go directly from your accommodations to the—— A. I walked——

Q. To the powder room?

A. Directly to the powder room.

Q. Were you alone?

A. I was with a friend.

Q. Who was that friend?

A. Mrs. Rogers from Dallas.

Q. Was she also a guest at the hotel?

A. Yes.

Q. And at that time was staying at the hotel?

A. Yes.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. Did you and Mrs. Rogers go together from your accommodations to the powder room?

A. Yes.

Q. Just the two of you? [13]

A. No, her husband was with us.

Q. Would you mind repeating her name?

A. Rogers.

Q. Did Mrs. Rogers have a coat that night?

A. Yes, she had a fur coat.

Q. It was a fur coat?

A. It was a fur coat, yes.

Q. Do you know the kind of coat it was?

A. It was a mink coat.

Q. Was the same—— A. Full length.

Q. It was the same type, wild Canadian natural mink? A. No, it was not.

Q. Did she leave her coat in the powder room?

A. Yes.

Q. After you left your coats in the powder room you and Mr. and Mrs. Rogers went into the dining room? A. Yes.

Q. Did you mention to the head waiter or anyone at the hotel that you had this particular night put your coat in the powder room? A. No.

Q. Did Mrs. Rogers make any mention of the fact that she left her coat there? [14] A. No.

Q. And then I take it you ate in the dining room? A. Yes.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. What time did you leave the dining room itself?

A. Well, I would say around eight-thirty to a quarter of nine, approximately that time.

Q. Where did you go from the dining room?

A. Into the lounge—into the main lobby.

Q. Now, as I recall the hall from the lounge into the dining room off which is the powder room is at the west end of the lobby of the lounge?

A. It would be north and west. I think I am right. North and west.

Q. Well, the dining room hallway is at the rear of the large lobby room?

A. Well, there is a hallway that runs this way and that part is the desk; then the main lounge is off on the side of that, to the right from the desk.

Q. Where did you sit in the lounge that night?

A. Well—

Q. Was it towards the front?

A. Yes, it was towards the front. We were seated right in the—we were looking right into [15] the desk in other words. Having a round-table discussion in there.

Q. Just a group of you sitting around conversing?

A. Playing twenty questions and answers, was the game we were playing.

Q. Could you see from where you were sitting into the dining room? A. No.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. You could just see the end of the hall from the lounge into the dining room? A. Yes.

Q. Could you tell me whether there is an easy access from the powder room to the outside other than through the lounge where you were sitting?

A. Not as you would term an easy access.

Q. Would it be necessary to go through the dining room and kitchens in order to avoid going through the lobby getting outside from the powder room?

A. It would, yes. It would mean going through the dining room.

Q. Is there a door to the outside from the dining room? A. Yes.

Q. Do you recall whether that door was open or locked that particular—— [16]

A. I am sure it was open.

Q. It was open? A. Yes.

Q. Was there a screen door? A. Yes.

Q. The screen door was unlatched, too, was it.

A. Well, I didn't go in the door, but I am just assuming it was open because it had been open on other nights. It was open on other nights.

Q. In other words, the guests can go into the dining room either through the lounge or from the outside? A. That is right.

Q. Where does that outside dining room door open?

A. On to the covered porch on the front.

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

Q. On the street side of the dining room?

A. The street side of the dining room on the far end.

Q. Were there quite a number of diners there that night? A. Yes.

Q. Were you the first to leave—were you among the first to leave the dining room?

A. Well, I don't believe I can answer that because I—— [17]

Q. You don't remember?

A. No. Assuming from other dinners and other Sunday evenings I would say that I would be right about the middle of the time that most diners left the room.

Q. And after you had eaten that night you sat in the main lounge until around ten or ten-fifteen?

A. Yes.

Q. And then what did you do? What was the first thing you did after completing this game?

A. We walked back to the lounge, Mrs. Rogers and I, and Mr. Rogers was waiting at the door. And when I went in I said—of course, there were very few coats left. And when I missed mine I said, "Oh, someone has made a mistake and taken my coat." That was my first thought. Then we checked with the different ones that were in the lounge and they came and identified their coats and there was not a coat left. Then I knew that someone had taken my coat. Until that time I didn't realize the coat had been stolen.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. You went from where you were sitting in front of the desk and towards the street side of the lobby, you went directly to the powder room to get your coat? A. Yes. [18]

Q. And go to your room? A. Yes.

Q. Did you take any particular notice of the coats that were worn out of the lobby while you were sitting there that night? A. No.

Q. How many coats were left in the powder room when you went to pick up yours, just approximately?

A. Well, I would say twenty-five to thirty. Maybe not that many, but I will say approximately twenty-five.

Q. There were that many left there?

A. Yes, still in there.

Q. There had been a greater number earlier in the evening? A. Oh, yes.

Q. How many were in there when you put your coat there? A. I would say two hundred.

Q. Were they all—— A. Approximately.

Q. A goodly number of them furs?

A. Yes.

Q. Did anybody else miss a coat that night as far as you know? A. As far as I know no.

Q. Was your coat in any way outstanding as compared to the number of other fur coats that were there?

A. Well, my coat was beautiful, but there were

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

many handsome coats there. My coat compared with them, but I don't know that it was——

Q. Was there anything about your coat that would attract a person's eye to it when it was with many other coats?

A. Not particularly. I mean, I think a person that would recognize a good fur would recognize my coat as being a good fur. Not anything particularly on the coat to attract them. There was nothing on it particularly.

Q. There were a number of other expensive coats left in the powder room that night?

A. Yes. Not when we went back, but there was when we went in.

Q. When you went to pick up your coat the other furs were gone?

A. Most of them.

Q. Just a few left?

A. This may not be relative to the question but most of the ones that were left were the ones that live in the hotel. They had worn lighterweight coats. [20]

Q. Can you tell me whether a valuable mink coat like yours has one serial number assigned to it, or is each pelt numbered separately?

A. I don't know.

Q. You don't know?

A. No.

Q. Do you ever recall having seen a number designation for your coat?

A. No, other than—I haven't been that ob-

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

servant. I am sure there was a serial number on it when it has been stored for the season for the winter—or the summer. Whether that serial number was put on by the furrier or whether that was put on by the company that stored it I wouldn't know.

Q. When you went to get your coat that night out of the powder room was the dining room closed?

A. Yes.

Q. Were the doors into the dining room from the lobby locked? A. I didn't try the door.

Q. Were the lights out in the dining room?

A. Yes.

Q. Was there anyone at the desk at the end of the hall from the dining room into the lobby?

A. Yes.

Q. Some of the hotel personnel was on duty there? [21]

A. That is a closed wall from the desk—office on that side; couldn't possibly see down to the dining room.

Q. A person who might be on duty at the hotel desk could not see to the dining room?

A. No.

Q. To whom did you report the fact that your coat was missing?

A. To the lady at the desk and she in turn called Mr. Quarty.

Q. Where was Mr. Quarty?

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

A. Well, that I don't know. She picked up the 'phone and called him.

Q. Did he come in response to that telephone call? A. Yes.

Q. And how long was it then before you left the area right around the desk and powder room there? A. Midnight or later.

Q. You stayed trying to locate your coat?

A. Yes.

Q. And then did you go out the front door of the lobby? A. Yes.

Q. And down the covered walk to the walk [22] that goes back into what you call Orange Grove Avenue? A. Yes.

Q. Did you pass the outside door to the dining room as you went that way? A. Yes.

Q. Did you notice whether it was open or closed?

A. No.

Q. Did you notice whether the screen door distinguished from the door itself was closed?

A. No.

Q. That night did you notice any strangers about the hotel? A. Yes.

Q. Were there several of them? A. Yes.

Q. Any of them have fur coats?

A. That I didn't notice. I didn't notice any.

Q. Were the strangers guests of the people staying at the hotel?

A. As nearly as I know they were.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. You were familiar at least with the faces of most of the regular——

A. Oh, yes. It had just been casually mentioned there were several outside parties. So that was just all—I just happened to remember that.

Q. Did you meet any of them? [23]

A. No, I did not.

Q. None of them were with—in your party?

A. No, no.

Q. Mrs. Rogers' coat had not been removed?

A. No, it was right where she put it.

Q. It was right where she had hung it herself?

A. Yes.

Q. Do you recall whether Mr. Rogers wore a coat that night?

A. Yes, he did.

Q. Wore an overcoat?

A. Yes.

Q. And where did he leave his coat?

A. On the right side in the men's room.

Q. Were any other coats taken that night as far as you know?

A. No.

Q. Did you hear about any other coats missing?

A. No.

Q. Were the police called in that night, Mrs. Corrigan?

A. The Sheriff of Chandler was called in.

Q. And you never heard any more about your coat?

A. Never have.

Q. The last you saw of it was that night around

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

seven or seventy-thirty when you hung it in the [24]
powder room? A. That is right.

Q. Did you have other coats of comparable
value?

A. No, I didn't have another coat with me as
valuable as that one, or half as valuable. I had
several coats with me.

Q. Did you keep all of your jewelry in your
room there at the hotel? A. Yes.

Q. You never did deposit that with the manage-
ment? A. No.

Q. There is a vault there available for deposit
of valuable articles, is there not?

A. That I don't know because I have never——

Q. You have never read a notice to the effect——

A. Never asked the question.

Q. Have you ever read a notice at the hotel to
the effect that they keep a safe deposit box?

A. Yes, I believe I have read that. I wouldn't
swear to that because I don't remember.

Q. That is your present recollection. You have
some recollection of having read a notice?

A. Some recollection there is a notice there.

Q. You never did deposit any of your articles
with the hotel? [25]

A. No, I lock them in my own room.

Q. It being your intention or feeling you could
look after your property just as well as the hotel?

A. Well, I don't know that I ever analyzed it.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Q. You just felt that you would rather have them with you? A. I just kept them is all.

Q. Was that for your own convenience in using your own articles? A. I believe so.

Q. Was it customary for you to sit some time after dinner in the lobby? A. Yes.

Q. Especially during the time that your husband was not at the hotel? A. Well, all the time.

Q. All the time? I mean, that was a general custom over there after dinner? A. Yes.

Q. A number of guests at any rate congregate in the hotel lobby? A. Yes.

Q. I don't recall whether you described that coat as a Canadian wild mink? A. That is right.

Q. Somewhere in our records we have gotten the [26] thought that it was a Labrador——

A. That is right. Labrador is definitely what it was, but it is a Province of Canada. In other words, the way they term it, it is a Labrador mink.

Q. That is the specific classification?

A. Classification.

Q. And the color you gave as natural. Is that a medium brown?

A. Medium brown, yes. In other words, there is one that is called a ranch mink. My understanding is, a ranch mink is just a little bit darker than the wild in most cases.

Q. Were there any marks of identification on this coat of which you know?

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

A. My initials were in the lining.

Q. In the lining? A. Yes.

Q. Where? A. On the pocket "C.R.C."

Q. On the inside of the pocket?

A. No, no. On the lining just over the pocket, had an inside pocket. My initials were right in the lining.

Q. In other words, when the coat was opened on the inside of the right side would be your initials C.R.C.? [27] A. That is right.

Q. Mrs. Corrigan, what is meant by full length? Where did the coat strike you?

A. Hem length.

Q. Hem length? A. Yes.

Q. That would be about mid way between the ankle and knee?

A. I would say twelve to—anywhere from eleven to thirteen inches from the floor. That is just approximately.

Q. I don't know much about these coats?

A. That is what it is.

Q. What type of collar?

A. Tuxedo; almost straight down.

Q. Ran almost the length of the coat?

A. Did run the length of the coat.

Q. And the sleeves?

A. Full and had what they call a guard sleeve inside of the lining, had a band on the sleeve.

Q. Were there cuffs on the sleeves?

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

A. Well, it could be either a cuff or straight. It hung down about there. You could turn them up or wear them long. It was not a definite cuff.

Q. You do quite a bit of traveling?

A. Not a great deal I don't think. [28]

Q. Maybe an occasional trip to New York from Dallas?

A. Yes. Several trips a year.

Q. You have been spending your winters at the San Marcos for several years?

A. Yes, seven to be exact.

Q. Seven?

A. Yes. This is the seventh——

Q. This year is the seventh trip there?

A. Yes.

Q. And during that time you have never given any jewelry or clothing, luggage into the direct custody of the hotel?

A. Not that I recall.

Q. How did you——

A. I may have in the first years, but I don't recall it.

Q. How did you come to Phoenix—or to Chandler for the 1948 season?

A. How?

Q. Yes? What means of transportation?

A. In my car.

Q. You drove?

A. Yes. Well, I think we did. We have flown out here once or twice. I think in '48 we came by car. [29]

Q. Did you bring all of your luggage with you?

Plaintiffs' Exhibit No. 1—(Continued)

(Deposition of Clara R. Corrigan.)

A. Yes.

Q. None was shipped?

A. Well, I shipped some one year. I can't remember whether it was last year or not. I shipped things out here before, but I don't believe I did in '48.

Q. Do you remember how you brought that coat?

A. Yes, I brought that coat on my arm.

Q. You carried that with you in the car?

A. Oh, yes, indeed, because I wore it most of the way out here.

Q. Mr. Corrigan is an insurance agent, is he?

A. I don't know.

Q. You don't know what his business is?

A. Yes, I know what his business is.

Q. What is his business? A. Real Estate.

Q. Real Estate? A. Yes.

Q. And you consider yourself a housewife. I mean, you don't personally participate in his business?

A. Certainly I participate in it, but I don't run the business if that is what you mean.

Q. I mean, do you work in the business? [30]

A. No.

Q. Not at all?

A. No. I am a housewife.

Mr. Carson: I guess that is all.

Plaintiffs' Exhibit No. 1—(Continued)
(Deposition of Clara R. Corrigan.)

Redirect Examination

By Mr. Sutter:

Q. I have just one or two more questions, Mrs. Corrigan. From your description, I take it that the dining room at the hotel is in the main building?

A. Yes.

Q. And is the cottage in which you were staying in 1948 attached to the main building in any way?

A. No.

Q. You have to walk outside in the open air in order to get from your cottage to the dining room?

A. Yes.

Q. During the seven seasons you stayed at the San Marcos has any other place been provided for the guests to place their coats while using the facilities of the dining room? A. No.

Q. Just the powder room to which you have referred? A. That is right.

Q. And during that period has it always [31] been the custom for the lady guests to place their coats in the powder room? A. Yes.

Q. Will you be in the State of Arizona next Tuesday, the 1st of March? A. No.

Q. Where will you be at that time, Mrs. Corrigan? A. In Dallas.

Mr. Sutter: I believe that is all.

Mr. Carson: That is all.

[Endorsed]: Filed February 28, 1949. [32]

PLAINTIFFS' EXHIBIT No. 2

Deposition of L. F. Corrigan

L. F. CORRIGAN

being first duly sworn to testify to the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Sutter:

Q. Your name is L. F. Corrigan?

A. That is right.

Q. And you are the husband of Clara R. Corrigan?

A. Yes, sir.

Q. Where do you live, Mr. Corrigan? Same address?

A. Same address.

Q. That is on Versailles Street, Dallas, Texas?

A. Yes, sir.

Q. What is your occupation?

A. Real Estate. I have an insurance agency also since the gentleman was asking the question.

Q. In connection with your real estate business you operate an insurance agency?

A. Yes.

Q. Were you familiar with a mink fur coat which was owned by your wife up until February 15, 1948?

A. Yes, sir, I bought it.

Q. You bought it for her?

A. Yes, sir.

Q. And about how long before that date did you purchase the coat? [33]

A. I wouldn't attempt to remember. The files are there. The insurance was purchased, the appraisal was made and attached to the policy at the time of the purchase. That is it.

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of L. F. Corrigan.)

Q. Did you take out the policy of insurance on the coat? A. I had my office——

Q. It was written through your office?

A. Yes.

Q. At your instance? A. Yes.

Q. And what was the name of that company, Mr. Corrigan?

A. General—we have several companies in the office. I don't recall the—General of America. I see it there now.

Mr. Sutter: You can mark these two documents.

(Thereupon a document entitled "Personal Property Floater Policy. General Insurance Company of America" was marked Plaintiffs' Exhibit A for identification by the Notary. Also, a document entitled "Inland Marine Proof of Loss" was marked Plaintiffs' Exhibit B for identification by the Notary.)

Mr. Sutter: Mr. Corrigan, I hand you a document marked Plaintiff's Exhibit A for identification, and [34] is that a copy of the policy to which you have just referred?

A. I wouldn't know. I have never seen the policy.

Q. You never seen the policy?

A. No, sir. It was purchased at the office and handled by the office as a lot of other policies on a lot of things that I have and operate.

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of L. F. Corrigan.)

Q. Referring to the inserts in that exhibit do you see listed there one item——

A. One natural wild mink coat. This shows \$7,000.00.

Q. Appraised at \$7,000.00 for the purpose of insurance?

A. It was appraised at the time of purchase.

Q. Referring to Plaintiffs' Exhibit B for identification——

A. Yes, sir, I signed this Proof of Loss.

Q. Is that your signature that appears on that?

A. Yes, sir.

Q. And that is the proof of loss in connection with this particular fur coat? A. Yes, sir.

Q. Do you know the value of this coat at the time it was stolen?

A. At that time I didn't, at the time it was [35] stolen. We went to purchase one later; I learned they wanted about twelve five for its equal. That is when I learned——

Q. For an equivalent coat?

A. Yes, sir. The details of the coat, the length of the hair, number of pelts or stamps I don't know anything about that.

Q. The insurance company paid you \$7,000.00 on the coat, did they?

A. Yes, sir. To my knowledge, yes, sir.

Mr. Sutter: That is all.

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of L. F. Corrigan.)

Cross-Examination

By Mr. Carson:

Q. Mr. Corrigan, you don't—

A. And since then I bought an inferior one that I paid equal dollars for plus quite an excellent Federal tax that is no longer deductible. Personally I sustained quite a loss.

Q. You don't know how fur experts mark coats for identification?

A. No, sir. I am not in that business.

Q. I thought you might have learned in the process of purchasing a coat for your wife?

A. No, I can't on one or two or three times.

Q. Mr. Corrigan, do you recall what you paid for the coat when you purchased it? [36]

A. My hazy recollection was \$7,500.00. I don't know—I don't remember the purchase price because there was a tax and there was a price. I can't remember two years back. I couldn't attempt to remember. I don't remember.

Q. You spoke of the appraised value of the coat. Was that appraisal made at the time you took out the—

A. At the time the coat was shipped to us by the furrier and prior to insuring I asked the appraisal be forwarded in order to have that to justify the insurance that it was purchased for.

Q. That appraisal was \$7,000.00?

Plaintiffs' Exhibit No. 2—(Continued)
(Deposition of L. F. Corrigan.)

A. Whatever the file shows, and it is so listed in the policy and the company respected it.

Q. You listed the——

A. The coat was listed in the policy.

Q. The coat was listed in the policy at its appraised value?

A. Yes, sir. There is an appraisal given to the company, which I rather think is their custom, supporting the insurance. That is my recollection. I don't know the details of it. I don't think an insurance company arbitrarily insures a coat for whatever value a layman might designate. I think it would be supported by an appraisal. Is [37] that right or wrong? Do you know?

Mr. Sutter: I think that is the general practice, yes.

Mr. Carson: You have assigned any claims you might have in connection with this loss to the insurance company?

A. That is part of the policy. It carries a right of subrogation. We have not joined in the suit.

Q. Well, the suit was brought in your name by the company? A. Yes.

Q. With your consent?

A. Yes, but we likewise still have the right of joining in the suit. I believe that is right.

Q. You have no actionable interest in the outcome of the suit?

A. At the present time I am here—I might

Plaintiffs' Exhibit No. 2—(Continued)

(Deposition of L. F. Corrigan.)

qualify, as you did on the use of this instrument—I might say at this time I am here as a witness at the instance of the insurance company.

Q. Yes. I mean there is no financial gain to you?

A. In this suit of the insurance company none whatever.

Q. Whether or not you took a loss you are [38] out as far as the coat is concerned?

A. I have lost the coat, yes. I haven't found the coat. I don't have it.

Q. Would you like to have it back if we could find it?

A. Yes, sir. I think it was a superior coat to the one purchased. The furrier so stated that to us.

Q. Did you purchase this new coat from——

A. The same furrier.

Q. M. Solomon?

A. Yes, sir, the same furrier. I didn't appreciate the increase in the value of it as the time went on. I paid no attention to it.

Q. The insurance was written through your office in Dallas? A. Yes, sir.

Q. By some member of your staff?

A. Yes. Miss Henry I think signed this Proof of Loss. I would rather think she was the one that wrote the policy.

Q. She is an employee of yours?

A. Yes, sir.

PLAINTIFFS' EXHIBIT No. 3

Personal Property Floater Policy
General Insurance Company of America
Seattle 5, Washington

(A stock insurance company, herein called the company)

PPF 32509

Replaced Policy

Amount: Item (a) \$27,300, (b) \$12,700.00, (c) \$ Nil; Total \$40,000.00.

Rate: Item (a) \$ various, (b) \$4.675—2.125, (c) \$ Nil.

Premium: Item (a) \$275.86, (b) \$402.38, (c) \$ Nil; Total \$678.24.

In Consideration of the Stipulations herein named and of Six Hundred Seventy Eight and 24/100 Dollars Premium Does Insure L. F. Corrigan hereinafter called the Assured Whose address is 4404 Versailles, Highland Park, Texas From the 17 day of March 1947, to the 17 day of March 1950 beginning and ending at noon, Standard Time at place of issuance, to an amount not exceeding Forty Thousand and No/100 Dollars, on the following described property:

Property Covered

1. Personal property owned, used or worn by the persons in whose name this policy is issued, hereinafter called the Assured, and members of the Assured's family of the same household, while in all situations, except as hereinafter provided.

Plaintiffs' Exhibit No. 3—(Continued)

Perils Insured

2. All risks of loss of or damage to property covered except as hereinafter provided.

Amounts of Insurance

3. Insurance attaches only with respect to those items in this paragraph for which an amount is shown and only for such amount.

Item (a), Amount, \$27,300.00. On unscheduled personal property, except as hereinafter provided.

Item (b), Amount \$12,700.00. On personal jewelry, watches, furs, fine arts and other property as per schedules attached hereto. Each item considered separately insured.

Item (c), Amount \$ Nil. On unscheduled personal jewelry, watches and furs, in addition to the amount of \$250.00 provided in Paragraph 5(b), against fire and lightning only.

Total \$40,000.00.

Declarations of the Assured

The following are the approximate values of the unscheduled personal property, other than jewelry, watches and furs, as estimated by the Assured, at the time of issuance of this policy: (Not to include property excluded under Paragraph 6(a).)

Wherever Located

(a)	Silverware	\$ 2,500.00
(b)	Linens (including dining room and bedroom)	\$ 2,000.00
(c)	Clothing	\$ 3,000.00

Plaintiffs' Exhibit No. 3—(Continued)

(d)	Rugs (including all floor coverings) and draperies	\$ 4,000.00
(e)	Books and manuscripts	\$ 500.00
(f)	Musical Instruments	\$ 2,500.00
(g)	Paintings, etchings, pictures, and other objects of art.....	\$ 1,500.00
(h)	China and glassware	\$ 1,000.00
(i)	All other personal property, includ- ing furniture, household goods, cam- eras and equipment, hunting, fishing, golf and other sports equipment, wines and liquors, and professional property (if any) covered under Paragraph 6(c)	\$10,000.00
Total		\$27,000.00

(Of which the following amounts in-
volve personal property ordinarily situ-
ated throughout the year at residences
other than principal residence.).....(\$ None)

Note: If the total value ordinarily situated
throughout the year at residences other than the
principal residence exceeds ten per cent of the
amount of the insurance granted under Item (a)
Paragraph 3, such excess value is not insured here-
under unless specifically endorsed hereon.

This Policy Is Made And Accepted Subject To
The Foregoing Stipulations And Conditions And
To The Conditions Printed On The Back Hereof,
which are hereby specially referred to and made a
part of this policy, together with such other pro-

Plaintiffs' Exhibit No. 3—(Continued)

visions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

Countersigned at Dallas, Texas this 17 day of March 1947.

CORRIGAN INSURANCE
AGENCY
Agent.

Conditions Referred To On The Face Hereof
Extensions

4. (a) Subject otherwise to all of the conditions of this policy, Item (a) Paragraph 3, includes, at the sole option of the Assured, personal property of others while on the premises of the residences of the Assured, and personal property of servants while they are actually engaged in the service of the Assured and while in the physical custody of such servants outside such residences;

(b) The Company will also pay the actual loss of or damage (except by fire) to property of the Assured not specifically excluded by this policy caused by theft or attempt thereat; or by vandalism

Plaintiffs' Exhibit No. 3—(Continued)

or malicious mischief to the interior of the residences of the Assured;

but in no event shall the Company's combined liability for loss and damage covered under this Paragraph 4 and for insurance attaching under Item (a) Paragraph 3, exceed the amount of insurance shown in Item (a) Paragraph 3.

Limitations

5. (a) As respects unscheduled personal property ordinarily situated throughout the year at residences other than the principal residence of the Assured, the Company shall not be liable in excess of ten per cent of the amount of insurance set forth in Item (a) Paragraph 3.

(b) As respects any one loss of unscheduled jewelry, watches and furs, the Company shall not be liable for more than \$250.00 unless the loss is covered under Item (c) Paragraph 3, in which event the Company's liability for such loss is limited to the amount stated therein.

(c) As respects any one loss of money including numismatic property, the Company shall not be liable for more than \$100.00. As respects any one loss of notes, securities, stamps including philatelic property, accounts, bills, deeds, evidences of debt, letters of credit, passports, documents and railroad and other tickets, the Company shall not be liable for more than \$500.00.

Exclusions

6. This policy does not insure

Plaintiffs' Exhibit No. 3—(Continued)

(a) property not specifically scheduled herein, ordinarily situated throughout the year in states where this form of policy is prohibited by law or by State Administrative regulation;

(b) animals; automobiles, motorcycles, aircraft, boats or other conveyances (except bicycles, tricycles, baby carriages, invalid chairs and similar conveniences), or their equipment or furnishings except when removed therefrom and actually on the premises of residences of the Assured; property of any Government or subdivision thereof;

(c) unscheduled property pertaining to a business, profession or occupation of the persons whose property is insured hereunder, excepting professional books, instruments and other professional equipment owned by the Assured while actually within the residences of the Assured;

(d) against breakage of eye glasses, glassware, statuary, marbles, bric-a-brac, porcelains and similar fragile articles (jewelry, watches, bronzes, cameras and photographic lenses excepted), unless occasioned by theft or attempted thereat, vandalism or malicious mischief, or by fire, lightning, wind-storm, earthquake, flood, explosion, falling aircraft, rioters, strikers, collapse of building, accident to conveyance or other similar casualty, nor unless likewise occasioned, against marring or scratching of any property not specifically scheduled herein;

(e) against mechanical breakdown; against loss or damage to electrical apparatus caused by elec-

Plaintiffs' Exhibit No. 3—(Continued)

tricity other than lightning unless fire ensues and then only for loss or damage by such ensuing fire;

(f) against wear and tear; against loss or damage caused by dampness of atmosphere or extremes of temperature unless such loss or damage is directly caused by rain, snow, sleet, hail, bursting of pipes or apparatus; against deterioration, moth, vermin and inherent vice; against damage to property (watches, jewelry and furs excepted) occasioned by or actually resulting from any work thereon in the course of any refinishing, renovating or repairing process;

(g) property on exhibition at Fairgrounds or on the premises of any National or International Exposition unless such premises are specifically herein described;

(h) against loss or damage arising from war, invasion, hostilities, rebellion, insurrection, seizure or destruction under quarantine or customs regulations, confiscation by order of any government or public authority and risks of contraband or illegal transportation or trade. This clause shall not be construed to apply to strikes, riots or civil commotions, nor to damage or destruction by civil authority during a conflagration and for the purposes of retarding the same, provided neither such conflagration nor such damage or destruction is caused or contributed to by war, invasion, hostilities, rebellion, insurrection or warlike operations. This subparagraph shall not be affected by any endorsement which does not specifically refer to it.

Plaintiffs' Exhibit No. 3—(Continued)

7. Declarations of the Assured (See Face of Policy).

8. Unless otherwise endorsed hereon, no other insurance against the risks hereby insured is permitted on the property covered hereunder except as to property described under Paragraphs 4(a) and (b), 5(b) and (c), 6(b) and (c). If at the time of loss or damage, there is any other insurance which would attach on the property described in Paragraphs 4(a) and (b), 5(b) and (c), 6(b) and (c) had this policy not been effected, then this insurance shall apply only as excess insurance over all such other insurance whether valid or not and in no event as contributing insurance.

Conditions

This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss.

The Assured shall immediately report to this Company or its Agent every loss or damage which may become a claim under this policy, and shall also file with the Company or its Agent within ninety days from date of loss, a detailed sworn proof of loss. Failure by the Assured either to report the said loss or damage or to file such written proofs of loss as herein provided shall invalidate any claim under this policy.

Plaintiffs' Exhibit No. 3—(Continued)

The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company, relative to any and all matters in connection with a claim, and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

Unless otherwise provided in form attached, this Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the Assured to repair or replace the same with material of like kind and quality.

All adjusted claims shall be paid or made good to the Assured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of this Company.

No loss shall be paid hereunder if the Assured has collected the same from others.

It is warranted by the Assured that this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

Plaintiffs' Exhibit No. 3—(Continued)

This Company may require from the Assured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

Every claim paid hereunder reduces the amount insured by the sum so paid unless the same be reinstated by payment of additional premium thereon, except that, in the event of any loss payment under this policy not exceeding Two Hundred Fifty Dollars (\$250.00), the amount of insurance under this policy shall not be reduced.

It is understood and agreed that, in the event of loss of or damage to any article or articles which are a part of a set, the measure of loss of or damage to such article or articles shall be a reasonable and fair proportion of the total value of the set, giving consideration to the importance of said article or articles, but in no event shall such loss or damage be construed to mean total loss of set.

In case of loss or injury to any part of the insured property consisting, when complete for sale or use, of several parts, this Company shall only be liable for the insured value of the part lost or damaged.

In case of loss or damage, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof without prejudice to this insurance; nor shall the acts of the Assured or this Company, in recovering,

Plaintiffs' Exhibit No. 3—(Continued)

saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment, to the charge whereof this Company will contribute according to the rate and quantity of the sum herein insured.

It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein.

In case the Assured and this Company shall fail to agree as to the amount of loss or damage, the same shall be ascertained by two competent and disinterested appraisers, the Assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound values and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; the parties thereto shall pay the appraisers respec-

Plaintiffs' Exhibit No. 3—(Continued)

tively selected by them, and shall bear equally the expense of the appraisal and umpire.

This policy may be cancelled at any time upon request of the Assured, the Company retaining or collecting the customary short rates for the time it has been in force; or, it may be cancelled by the Company by delivering or mailing to the Assured at the address stated herein five days' written notice of such cancellation and, if the premium has been paid, by tendering in cash, postal money order, or check, the pro rata unearned premium thereon.

In Witness Whereof, this Company has executed and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

/s/ H. K. DENT,

President.

/s/ L. E. CROWE,

Secretary.

(Endorsements and Schedules)

Item No.	Description	Amount of Insurance
1.	One gents yellow gold diamond ring about .85 carat	400.00
2.	One ladies sapphire & diamond ring, yellow gold, cocktail, 8 diamonds—17 sapphires.	650.00
3.	One white gold 7 diamond dinner ring..	150.00
4.	One platinum large top diamond ring, 18 small diamonds, 1 large diamond about 1 carat	850.00

Plaintiffs' Exhibit No. 3—(Continued)

5. One platinum large top diamond ring 22 small round diamonds, 2 marquis diamonds, 1 large diamond about 1.90 carats. 1000.00
6. One platinum bar pin, 7 diamonds & 6 sapphires 150.00
7. One platinum bracelet, 65 diamonds, 16 small sapphires 1500.00
8. One natural wild mink coat..... 7000.00
9. Sherred Beaver coat..... 1000.00

All terms and conditions of the policy to which this endorsement is attached remain unchanged except as herein specifically provided.

This endorsement becomes effective at 12:00 Noon March 17, 1947 and is attached to and forms a part of policy number PPF 32509, issued by the General Insurance Company of America, to L. F. Corrigan.

/s/ H. K. DENT,
President.

/s/ L. E. CROWE,
Secretary.

Countersigned at Dallas, Texas. Date 3/17/47.

Agent Corrigan Insurance Agency.

[Endorsed]: Filed Mar. 1, 1949.

PLAINTIFFS' EXHIBIT No. 4

Inland Marine Proof of Loss

To the General Insurance Company of America or
First National Insurance Co. of America
Seattle, Washington

General Policy No. PPF 32509

First National Policy No.

Agency at Dallas, Texas

43-23,777

Amount of Policy

Scheduled\$12,700.00

Unscheduled ..\$27,300.00

Insuring Period

From 3-17-47 To 3-17-50

By your policy of insurance above described, you insured L. F. Corrigan.

According to the terms and conditions contained therein against loss or damage by fire and other causes, as specifically stated in said policy, to following property: Personal Property.

On the 15 day of February 1948 at about the hour of 10 PM a loss was sustained, which upon the best of my (our) knowledge and belief, was caused by theft from powder room of San Marcos Hotel, Chandler, Arizona.

The whole amount of insurance (whether valid or not), covering any of said property, at the time of the loss, including the above, and all other policies, binders or agreements to insure, was the sum of \$40,000.00.

Plaintiffs' Exhibit No. 4—(Continued)

The actual cash value of said property involved, at the time of loss, was the sum of \$.....

The whole amount of said loss and damage to said property, all as more particularly set forth in "Statement of Loss" attached hereto and made a part hereof, was the sum of \$7,000.00.

Less \$ Nil. Deductible \$.....

I/we hereby claim of this company, under the policy described herein, the sum of \$7,000.00.

The involved property was, at the time of the loss, located at Powder Room, San Marcos Hotel, Chandler, Ariz., in the custody of (unattended), and belonged to Mrs. L. F. Corrigan. No other person or persons had any interest therein; no assignment or transfer or encumbrance of said property had been made; and no change in the title, use, or possession of said property has occurred since the issuance of said policy except: No exceptions.

In consideration of the payment of above sum, I/we hereby assign to the company, and it is subrogated to all my/our rights of recovery for such loss and expense to the amount of above payment, and I/we hereby further agree to execute all documents required of me/us and to cooperate with said company in prosecuting all actions to effect such recovery, and the company is hereby authorized to prosecute any necessary action or proceeding in my name, or in its own, or in the name of any person or assignee to whom it may assign the claim hereunder, for the purpose of effecting collection of said amount.

Plaintiffs' Exhibit No. 4—(Continued)

The said loss was not caused by design or procurement of my/our part; nothing has been done by or with my/our privity or consent, to violate the condition of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were involved in the loss and insured under this policy; no property saved has been in any manner concealed, and no attempt to deceive the said insurers as to the extent of said loss, has in any manner been made.

Any other information that may be required will be furnished on call, and considered a part of this proof.

It is expressly understood and agreed that the furnishing of this blank to the assured or the preparing of proofs by an adjuster, or any agent of the insurers named in the policy is not a waiver of any rights of said insurers.

/s/ L. F. CORRIGAN,
Assured.

Witness my hand at Dallas, Texas, this 6th day of April, 1948.

Notarial acknowledgement required on claims of \$100 or over.

State of Texas,
County of Dallas—ss.

Personally appeared before me, the day and date above written, L. F. Corrigan, signer of the foregoing statement, who made solemn oath to the truth

Plaintiffs' Exhibit No. 4—(Continued)
of same, and that no material fact is withheld of
which the said insurance company should be advised.

[Seal] /s/ ELIZABETH HENRY,

Notary Public.

Schedule Showing Property Lost or Damaged,
and Value Thereof.

Description or Articles: Natural Wild Mink Coat.

Purchased From Whom: Maurice B. Salomon,
New York, N. Y.

Date: Oct. 1944.

[Endorsed]: Filed March 1, 1949.

Defendant's Case

Mr. Carson: Call Mr. Quarte, please.

JOHN QUARTE

was recalled by the defendant as a witness on behalf
of the defendant, and having been heretofore duly
sworn, testified as follows: [10]

Direct Examination

By Mr. Carson:

Q. Mr. Quarte, on what dates did Mr. and Mrs.
Corrigan make their reservations for this season
of '49?

A. Originally February 1st to March 1st, but

(Testimony of John Quarte.)

due to illness in the family they were unable to get here until the 12th of February, and they were to remain here until today, which is March 1st.

Q. In the cross examination by Mr. Sutter you stated that the guests left their wraps in this powder room if they chose to do so?

A. That is correct.

Q. Does the Hotel give any warning to those choosing to leave their wraps in that powder room that the Hotel will not be responsible for any loss?

Mr. Sutter: We object to that, Your Honor, on the basis that the Hotel cannot limit its liability by giving any notice or warning.

The Court: Well, I suppose a guest could leave his wrap any place he chooses, that would be up to him largely. I think he could leave it out in the lobby, if he cared to.

Mr. Carson: Did the Court rule on that objection?

The Court: Well, he can answer that.

Mr. Sutter: Would you answer the question?

A. We have a sign in this powder room saying that we are not responsible for any articles left here, the San Marcos Hotel.

Q. And what is the approximate size of that sign?

A. It is exactly four by seven and one-half inches.

Q. And where is it located in this powder room?

A. It is on the left as you walk out of the powder room, the left wall.

(Testimony of John Quarte.)

Q. Approximately at eye-level?

A. About five and one-half feet from the floor.

Q. And how far to the left of the doors?

A. Oh, I'd say probably around two and one-half, three feet.

Q. Is that powder room attended during meal hours?

A. The powder room is never attended. The only time we attend that, put an attendant in the powder room, is when we have a public dance, we have three or four dances during the season, and that is the only time we have an attendant, but for daily use of the guests, daily use, we do not have attendants.

Q. And the guests at the Hotel generally are aware of the disclaimer on the part of the Hotel of any liability?

A. I have frequently heard, because we do have [12] some expensive coats in there, and I have heard people say that—those who don't have expensive coats, say, "I wouldn't leave that lovely thing in there," and the general feeling is, "Why, it is insured, why worry about it?"

Q. But the guests then generally realize, when leaving wraps there, that they are doing that at their own risk?

A. I would certainly think so.

Mr. Sutter: I object to this because what the guests realize is not within his knowledge, it would be merely hearsay.

(Testimony of John Quarte.)

The Court: Yes, I think so.

Q. (By Mr. Carson): How large is the rack to which you referred as being located in the powder room?

A. About seven feet long.

Q. Mr. Quarte, would you describe the location of that powder room with reference to the front desk and the dining room?

A. The powder room is adjacent to the entrance to the dining room.

Q. It is on the left side of the hall?

A. The left side going into the dining room.

Q. And how large a room is that?

A. Oh, I'd say 15 by 20, perhaps 13 by 20. I don't know exactly. [13]

Q. And does it have more than the one entrance adjacent to the dining room door?

A. Just that one entrance.

Q. Did Mrs. Corrigan, to your knowledge, ever call to your attention or to the attention of any of your employees that she left her coat in the powder room that night, this night of February 15th, 1948?

Mr. Sutter: I object to that, if the Court please, on the ground it is immaterial if she called the attention of the attendant of the Hotel.

Mr. Carson: It is very material.

The Court: Is it your contention that the Hotel or the inn keeper has to watch each piece of apparel that a guest wears?

Mr. Sutter: Our contention is that an inn keeper is the insurer of all property brought into the hotel

(Testimony of John Quarte.)

by guests, except that which is lost by insurmountable or superhuman force, by a public enemy, or the guests.

The Court: I don't think that is the rule.

Mr. Carson: In this connection, the question and the answer that will be elicited is very material on the question of her negligence.

The Court: All right, go ahead.

The Witness: Yes. She originally—first, [14] rather, in fact, Mrs. Hicks, that is when I was summoned and she told me then that her coat was missing, yes.

Q. (By Mr. Carson): Did she notify anyone before the coat was reported missing, as far as you know, did she notify anyone that she had placed her coat in there?

A. No, sir; definitely not. I didn't see her come in that evening. The only time I saw her was when I was called on the scene.

Q. This sign to which you refer was posted in the powder room at that place that night of February 15th, 1948?

A. Yes, correct.

Q. Did Mrs. Corrigan ever, to your knowledge, turn her coat or any of her other articles of personal property over to the Hotel expressly for safe keeping by the Hotel?

A. No, sir, she never has.

Q. Did she always keep that in her own personal custody and control?

A. Yes.

Q. Do all of your guests always leave their wraps

(Testimony of John Quarte.)

in the powder room whenever they go into the dining room?

A. No, sir; some do and some don't. Some take them right in the dining room with them, and hang them over the chair while they are having their dinner.

Q. After the guests leave the dining room, do some of them who sit in the hotel lobby for a time after their meal always leave their coats in the powder room?

A. No, sir. Quite a few of them take them out and wear them in the lobby, due to the drafts with the doors opening and closing, and so on. Quite a few take their coats out of the powder room.

Mr. Carson: That is all.

Cross-Examination

By Mr. Sutter:

Q. Mr. Quarte, just one question. It is customary, is it not, for a number of your lady guests to place their coats in the powder room while they are in the dining room?

A. Yes, a few of them do, but they take it upon themselves to do so.

Q. And it is also customary for a number of your lady guests to take their coats into the lounge or leave them in the powder room?

A. A few of them do. [16]

Mr. Sutter: That is all.

(The witness was excused.)

Mr. Carson: Mrs. Hicks.

MRS. ELIZABETH HICKS

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Carson:

Q. Will you state your name, please?

A. Mrs. Elizabeth Hicks.

Q. You are employed at the San Marcos Hotel?

A. Yes, sir; I am the Social Director or Hostess.

Q. And were you so employed during the Winter season of '48? A. Yes, sir.

Q. Were you at the hotel on the night of February 15th, '48? A. Yes, I was.

Q. Do you have quite a close connection with the guests of the Hotel during their stay there?

A. Yes, I am with them all the time during their—the social activities in the Hotel. I am in and out and around mingling with them all the [17] time.

Q. You associate with them quite closely?

A. That is right.

Q. Will you state whether or not there is any common understanding or knowledge among the San Marcos Hotel guests as to the responsibility for wraps left in the powder room.

Mr. Sutter: We object to that, Your Honor, because any knowledge or understanding on the part of the guests would be mere hearsay as far as we are concerned, hearsay.

A. What I hear wouldn't be hearsay.

Mr. Carson: If the Court please, we are going

(Testimony of Mrs. Elizabeth Hicks.)

to the issue of negligence. If it was common understanding and knowledge among the guests that wraps left in the powder room were left there at the sole risk of the guests, whether or not Mr. Sutter might say the disclaimer of liability is binding, it does go to the fact that the persons leaving their wraps there in the face of that understanding and knowledge were negligent.

Mr. Sutter: Still, the only way that Mrs. Hicks would know that there was an understanding among the guests would be what the guests told her, and the guests themselves would be the best witnesses as to what they understood. We have no [18] right to cross examine them on that. It is pure hearsay.

The Court: Oh, I think so.

Mr. Carson: What was that ruling?

The Court: It is hearsay, of course.

Q. (By Mr. Carson): Did you ever, yourself, state to the guests at the Hotel that the Hotel was not responsible for articles left there?

Mr. Sutter: We object to that because what might have been stated to other guests is immaterial as far as the Corrigan's are concerned, and what may have been told to other guests is not binding on them.

The Court: Well, did you ever tell the Corrigan's that?

Q. (By Mr. Carson): Did you ever state, Mrs. Hicks, in the presence of either Mr. Corrigan or Mrs. Corrigan, or both of them, or to a group with

(Testimony of Mrs. Elizabeth Hicks.)

which they were present, that the Hotel was not responsible for wraps left there?

A. Well, not in front of Mr. Corrigan because he didn't have access to the ladies' powder room, but Mrs. Corrigan and her friends had beautiful coats. I am not fortunate enough to have one, and I have said more than once when I have been in there, "Well, I wouldn't leave that in here." [19] "Oh, what is the difference; it is insured," and that is their attitude out there. "It is insured," and it is just like people with a car, we don't care if it is stolen.

Mr. Sutter: We object to that on several grounds; one, it is not responsive to the question, and secondly, Mrs. Corrigan has not been present in any statement made, and it is merely a voluntary statement of the witness. We move that the answer be stricken.

The Court: She made the statement that Mrs. Corrigan was present, but she eliminated Mr. Corrigan. Did you make that statement to Mrs. Corrigan?

Q. (By Mr. Carson): Did you make that statement in her presence, Mrs. Hicks?

A. Mrs. Corrigan's coat was so very beautiful, everyone admired it——

The Court: No, just answer——

The Witness: Otherwise, I would not remember whether I said it to Mrs. Corrigan or not. It was a run of the mill understanding.

Mr. Sutter: I don't believe the witness has still

(Testimony of Mrs. Elizabeth Hicks.)

stated definitely that she made the statement to Mrs. Corrigan. I think she is assuming that she did, because of the fact that Mrs. Corrigan [20] had a nice coat.

The Court: All right.

Mr. Sutter: I renew my objection on that ground.

Mr. Carson: Referring to these statements that you have made, Mrs. Hicks, to the various guests at various times, can you recall having made those statements or statements of similar import in the presence of Mrs. Corrigan?

A. She would be one of the main reasons for making that statement.

Q. Did you make that statement to her?

A. I am quite certain that I did, because there was a certain group that have always left their coats in there before dinner and throughout the evening.

Q. And Mrs. Corrigan was a member of that group?

A. Yes, she was.

Q. And in the presence of that group of which Mrs. Corrigan was a member, you have then made the statement?

A. I certainly have.

Mr. Sutter: I wonder if I might ask one or two questions?

The Court: Well, when counsel finishes.

Q. (By Mr. Carson): Was there any attendant in that [21] night of February 15th?

A. No, there is no attendant in there.

Q. There generally is not?

(Testimony of Mrs. Elizabeth Hicks.)

A. That is right, there is not.

Q. And the guests, including Mrs. Corrigan, knew, did they, that the room was unattended?

A. They frequented it every day, so they knew it, and the sign in there in plain sight, there is no responsibility for articles left in that room.

Q. The sign to which Mr. Quarte referred is the one you are referring to now? A. Yes, sir.

Q. When you are leaving the room, leaving the powder room, does that sign attract your eye?

A. It is just at the left as you would go out where you would naturally see it.

Q. Mrs. Hicks, do you recall what Mrs. Corrigan did on the night of February 15th?

A. You mean during the evening or later, or?

Q. After dinner that night, do you recall what she did immediately after dinner?

A. Well, she was with a group in a game that we had, on a program every Sunday night, spent the evening in the lounge as participants in the game. They broke up about 10:00 o'clock. That is our usual schedule on it. [22]

Q. Did you notice Mrs. Corrigan particularly as to whether or not she had her coat on her after dinner in the lounge, in the lobby?

A. No, I didn't. I didn't notice her coat there that night on her at all.

Q. And was she moving about the lobby?

A. Well, after the game broke up everyone mills around and they were all talking, so I didn't notice

(Testimony of Mrs. Elizabeth Hicks.)

her in particular until she came to me a little later.

Q. What time did she come to you?

A. Shortly after 10:00.

Q. And what did she say?

A. She said, "My coat is not in the powder room."

Q. And then you made an investigation, did you?

A. Well, we all went right back, three or four of the other guests and I went back in and looked around. They leave them on the chairs and, as well as on the rack, and her coat was not among those there.

Q. And you did not find the coat that night?

A. No, it was not there.

Mr. Carson: That is all. [23]

Cross-Examination.

By Mr. Sutter:

Q. Mrs. Hicks, you stated that on occasions you had made the statement to a group of which Mrs. Corrigan was a member, that if you were there you would not leave your coat in the powder room, or words to that effect? A. That is right.

Q. On what occasions did you make those statements?

A. Before dinner, when we come from cocktail parties, before dinner when they are taking their wraps off and hanging them up.

Q. Do you recall on what occasion Mrs. Corrigan was present when you made such a statement to that group?

(Testimony of Mrs. Elizabeth Hicks.)

A. I have no reason to remember the date. It would be very fishy if I did. I would have no occasion to remember a date like that.

Q. To the best of your recollection, then, you merely made the statement to a group of ladies?

A. That is right.

Q. And Mrs. Corrigan at one time or another associated with that group?

A. That is right.

Q. Are you therefore assuming that Mrs. Corrigan [24] was present on one of those occasions, or do you know of your own knowledge that she was present on those occasions?

A. I am as certain as anyone could be on something that happened that has no particular significance with which it did happen, because that coat was such a beautiful coat that I know that she was among those to which I said, "I would not leave it if it were mine."

Q. You are basing your recollection on her presence on the fact she had a beautiful mink coat?

A. That is right, and she would be one of the people that I would want to be careful, and she is one of those people that have so much, is very careless because it is insured.

Mr. Sutter: We object to that last answer and move that it be stricken.

The Court: All right, that last observation will go out.

Mr. Sutter: That is all.

(The witness was excused.)

Mr. Carson: That is all, Your Honor.

Mr. Sutter: We have nothing further at this time. The plaintiffs move for judgment in accordance with the complaint. I realize the Court has not had an opportunity to examine the deposition [25] yet and probably is not ready to rule on the matter.

The Court: No, I have not read it.

(Thereupon argument between Court and counsel.)

The Court: Let the record show that the case is submitted.

Mr. Sutter: Would the Court desire written memorandum submitted on the matter?

The Court: Oh, I don't care, if you want to.

Mr. Carson: If there is no objection, I will make a short one.

The Court: All right.

(Thereupon the trial ended at 11:15 o'clock, a.m. of the same day.)

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 26 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

[Endorsed]: Filed July 18, 1949.

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of L. F. Corrigan and Clara R. Corrigan, who sue on behalf of General Insurance Company of America, a corporation, Plaintiffs, vs. San Marcos Hotel Company, a corporation, Defendant, numbered Civ-1211 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the entire record in said case, as designated in the Appellants' designation filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Complaint, filed July 16, 1948.
2. Answer, filed August 9, 1948.

3. Minute entry of March 1, 1949 (proceedings of trial).

4. Plaintiffs' Exhibit No. 1 in evidence (deposition of Clara R. Corrigan, filed March 1, 1949.

5. Plaintiffs' Exhibit No. 2 in evidence (deposition of L. F. Corrigan), filed March 1, 1949.

6. Plaintiffs' Exhibit No. 3 in evidence (insurance policy), filed March 1, 1949.

7. Plaintiffs' Exhibit No. 4 in evidence (proof of loss), filed March 1, 1949.

8. Minute entry of March 9, 1949 (order that defendant have judgment).

9. Defendant's proposed findings of fact and conclusions of law, filed March 21, 1949.

10. Plaintiffs' objections to proposed findings of fact and conclusions of law, filed March 22, 1949.

11. Plaintiffs' proposed findings of fact and conclusions of law, filed March 22, 1949.

12. Findings of fact and conclusions of law, filed July 8, 1949.

13. Judgment, filed July 8, 1949, and docketed on said date.

14. Reporter's transcript, filed July 18, 1949.

15. Plaintiffs' motion for new trial, filed July 18, 1949.

16. Minute entry of October 3, 1949 (order denying motion for new trial), docketed October 3, 1949.

17. Plaintiffs' notice of appeal, filed October 28, 1949.

18. Plaintiffs' bond on appeal, filed October 28, 1949.

19. Plaintiffs' Statement of point upon which plaintiffs intend to rely upon their appeal, filed October 28, 1949.

20. Designation of contents of record on appeal, filed October 28, 1949.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$3.60 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 26th day of November, 1949.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12410. United States Court of Appeals for the Ninth Circuit. L. F. Corrigan and Clara R. Corrigan, et al., Appellants, vs. San Marcos Hotel Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed November 28, 1949.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12410

L. F. CORRIGAN and CLARA R. CORRIGAN,
who sue on behalf of General Insurance Com-
pany of America, a corporation,
Appellants,
vs.

SAN MARCOS HOTEL COMPANY, a corpora-
tion,
Appellee.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED.

Statement of Points

Appellants intend to rely upon the following points upon their appeal herein, viz: All of the evidence in the cause, taken in the light most favorable to the appellee, fails to disclose any negligence upon the part of the appellants, or any one or more of them, that would excuse the appellee from the liability imposed upon it as an innkeeper under Section 62-304 of the Arizona Code of 1939.

Designation of Record to Be Printed

Appellants designate for printing herein the entire record, with the exception of the following portions thereof:

(a) Do not print the "Memorandum in Support

of Motion for New Trial” annexed to the “Motion for New Trial.”

(b) Do not print the stipulations and formal portions of the depositions of Clara R. Corrigan and L. F. Corrigan (plaintiff’s exhibits No. 1 and No. 2 in evidence), but, in this connection, print only the questions propounded to the witnesses and their answers thereto.

KRAMER, MORRISON,

ROCHE & PERRY,

By /s/ ALLEN K. PERRY,

Attorneys for Appellants.

On the 25th day of November, 1949, I mailed a true and correct copy of the foregoing document to counsel for appellee, viz. “Cunningham, Carson, Messinger & Carson, Title & Trust Building, Phoenix, Arizona.”

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed November 28, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF RECORD APPELLEE CONSIDERS MATERIAL AND DESIRES PRINTED AND HEARD.

Appellee, pursuant to Rule 19 of the above entitled Court, hereby designates the following material parts of the record to be included and printed as part of the record and heard herein in addition to the parts of the record designated for printing by appellants:

(a) Include "Memorandum in Support of Motion for New Trial" annexed to "Motion for New Trial."

(b) Include the whole of the depositions of Clara R. Corrigan and L. F. Corrigan (plaintiffs' Exhibits No. 1 and No. 2 in evidence) including the stipulations and formal portions thereof in addition to the questions propounded to the witnesses and their answers thereto.

CUNNINGHAM, CARSON,
MESSINGER & CARSON,
By /s/ CHAS. A. CARSON, JR.,
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 29, 1949.

No. 12410

United States
Court of Appeals
For the Ninth Circuit

L. F. CORRIGAN, et al.,

Appellants,

vs.

SAN MARCOS HOTEL COMPANY,

Appellee.

Opening Brief of Appellants

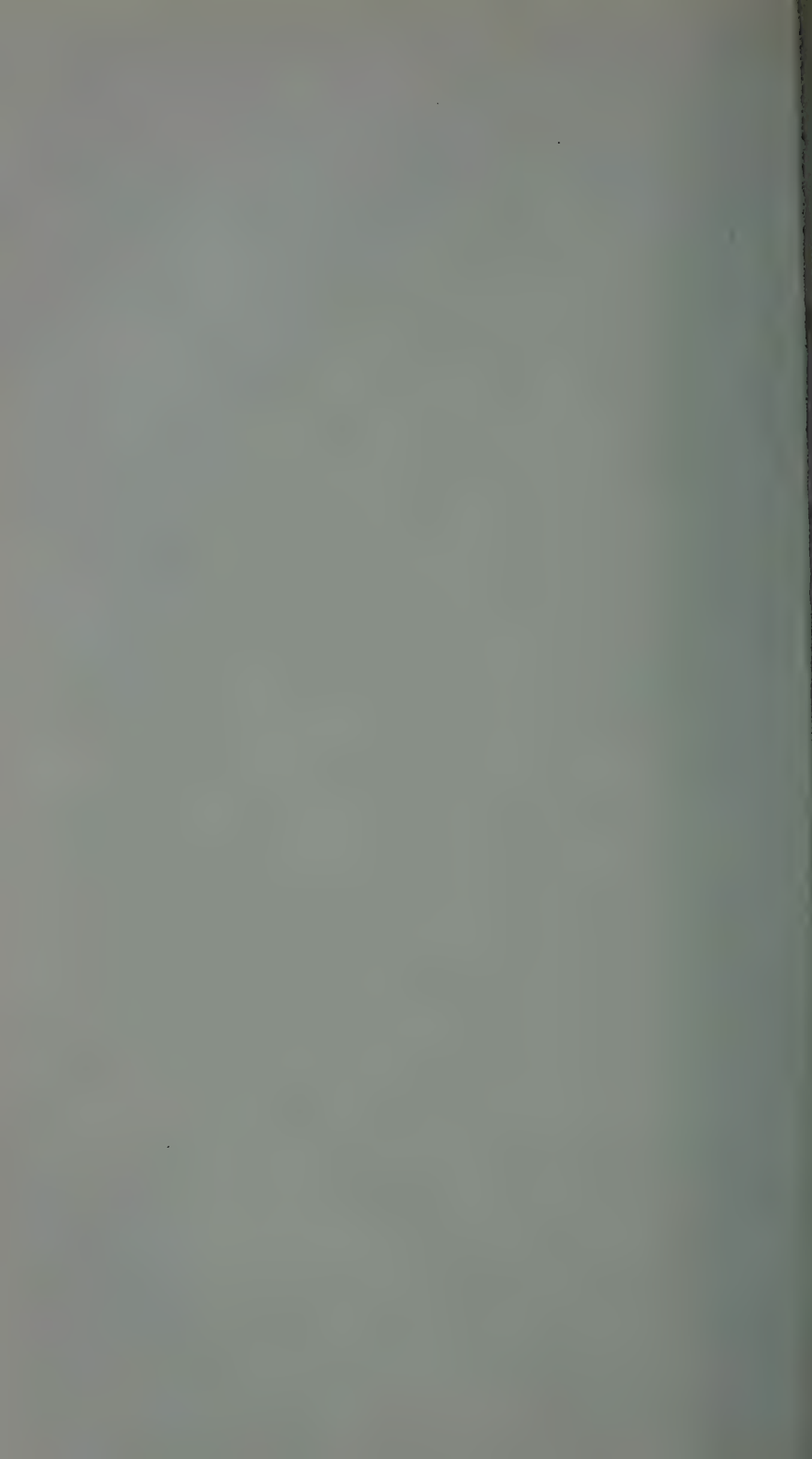
KRAMER, MORRISON, ROCHE & PERRY,
309 First National Bank Bldg.,
Phoenix, Arizona,

Attorneys for Appellants.

FILED

JAN 20 1950

PAUL P. O'BRIEN.



SUBJECT INDEX

	Page
Statement Relative to Jurisdiction.....	1
Statement of the Case.....	2
Specification of Errors	7
Summary of Argument.....	12
Argument	13
1. Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the existing circumstances, or the doing of that which such a person would not have done under such circumstances.....	13
2. Negligence is always relative to the surrounding circumstances of time, place, and persons	13
3. The hotel company could not limit its statutory liability by placing a sign in the powder room reading "Not responsible for articles left here"	19
4. An oral warning given by a hotel employee to a guest does not relieve the hotelkeeper of his statutory liability.....	22
5. There was no duty on the part of Mrs. Corrigan to notify the hotel company she was leaving her coat in the powder room.....	27
6. A guest has the right to rely upon prevailing custom and the hotel company is bound thereby	30
Conclusion	32

TABLE OF CASES AND AUTHORITIES CITED

	Page
Arizona Code of 1939, Section 62-304.....	2, 10, 12, 19
A. T. & S. F. R. Co. vs. France, 54 Ariz. 140, 94 P. 2d 434.....	13
Burton vs. Drake Hotel Company, 237 Ill. App. 76	31
Cunningham vs. Bucky, 42 W. Va. 671, 26 S. E. 442	15
Keith vs. Atkinson, 48 Colo. 480, 111 P. 55.....	31
Landrum vs. Harvey, 28 N. M. 243, 210 P. 104.....	15
Maxwell Operating Company vs. Harper, 138 Tenn. 640, 200 S. W. 515.....	20
Owl Drug Company vs. Crandall, 52 Ariz. 322, 80 P. 2d 952	13
Scarborough vs. Central Arizona Light & Power Co., 58 Ariz. 51, 117 P. 2d 487, 138 A. L. R. 866.....	13
Smith vs. Wilson, 36 Minn. 334, 31 N. W. 176.....	15
Southern Pacific Company vs. Buntin, 54 Ariz. 180, 94 P. 2d 639.....	13
Swanner vs. Conner Hotel Co., 224 S. W. 123.....	28
Watson vs. Loughran, 112 Ga. 837, 38 S. E. 82.....	17

No. 12410

United States
Court of Appeals
For the Ninth Circuit

L. F. CORRIGAN, et al.,

Appellants,

vs.

SAN MARCOS HOTEL COMPANY,

Appellee.

Opening Brief of Appellants

STATEMENT RELATIVE TO JURISDICTION

The original jurisdiction of the District Court was invoked by appellants (plaintiffs below) by reason of the diversity of citizenship of the parties.

Plaintiffs, Corrigans, are citizens of Texas. (Tr. 2.) Plaintiff General Insurance Company of America is a corporate citizen of the State of Washington. (Tr. 2.) Defendant, San Marcos Hotel Company, is a corporate citizen of Arizona. (Tr. 2-3.) The amount in controversy is seven thousand dollars, exclusive of interest and costs. (Tr. 5; 7.)

When the complaint was filed July 16, 1948, the District Court had jurisdiction under Section 41(1) of Title 28, U. S. C., as it then existed. Following the effective date of the new judicial code, September 1, 1948, the jurisdiction of the District Court continued, under Section 1332 of that act. (Sec. 1332, Title 28, U. S. C.) The Court of Appeals has jurisdiction to review the judgment of the District Court, under Section 1291 of Title 28, U. S. C.

STATEMENT OF THE CASE

This action is brought under the Arizona innkeeper's liability act (Section 62-304, Arizona Code of 1939), which reads, so far as here material:

“An innkeeper is liable for all losses of, or injuries to, personal property placed or left by his guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one brought into the inn by the guest. . . . ”

It is the contention of the appellants (plaintiffs below, and hereinafter referred to by name or as plaintiffs) that the appellee hotel company is liable for the loss of a fur coat belonging to the Corriganes. Defendant contended (successfully before the trial court) it was not liable, because the loss of the coat was occasioned by Mrs. Corrigan's own negligence. The issue of law presented by the appeal is whether all of the evidence, viewed in the light most favorable to the

hotel company, discloses any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it by the Arizona statute above referred to. (Tr. 109.) There is little factual dispute. These facts appear to be established by the record:

(a) General Insurance Company of America issued a policy of insurance to the Corriganes, which was in force at all times here material, whereby it agreed to indemnify them against loss or damage by theft of certain property including, among other things, a mink coat valued in the policy at seven thousand dollars, but of the approximate value of ten thousand dollars. (Tr. 18);

(b) Defendant owns and operates the San Marcos Hotel, at Chandler, Arizona (Tr. 5), where the Corriganes were winter guests for seven years. (Tr. 49-50);

(c) The hotel provided coat racks and coat hangers in the "ladies' room" or "powder room," where lady guests might leave their coats while they were eating in the dining room. (Tr. 37);

(d) During the seven years the Corriganes had spent their winters at the hotel, it was Mrs. Corrigan's custom to make use of such facilities and leave her coat in the powder room while she was eating in the dining room, and this fact was known to the hotel company. (Tr. 46);

(e) The dining room is in the main hotel building (Tr. 78) and during the winter season of 1948 the Corrigan's occupied a portion of one of the hotel cottages, located some distance from such main building. (Tr. 48.) It was necessary for them and the other guests in cottages to walk outside in the open air in going from the cottage to the hotel dining room for their meals. (Tr. 68);

(f) If Mrs. Corrigan had not made use of the facilities provided by the hotel in the powder room, she might have worn her coat while eating or hung it on the back of her dining room chair. Some ladies followed the latter course. (Tr. 96-97.) However, it was the general custom for lady guests at the hotel to leave their coats in the powder room while they ate in the dining room or loafed in the lounge (Tr. 50-68) and such custom was well known to the hotel company. (Tr. 37; 97.) Mrs. Corrigan followed such general custom during all the times she stayed at the hotel. (Tr. 46.)

(g) Except upon those occasions when a public dance was given at the hotel, it did not provide an attendant in the powder room and this fact was known to Mrs. Corrigan. (Tr. 94; 19-20);

(h) At the dinner hour on February 15, 1948 Mrs. Corrigan wore her coat from the cottage to the main building. (Tr. 45.) Before going into the dining room she hung her coat in the powder room, using the facilities provided by the hotel. (Tr. 46.) After din-

ner she sat in the lounge and played "Twenty Questions" with some of the other guests and about ten o'clock went to the powder room to get her coat and discovered it was gone. (Tr. 46);

(i) At the time she left her coat in the powder room there were approximately two hundred coats there—many of them valuable furs. When she returned for it there were approximately twenty-five; (Tr. 47)

(j) The hotel company had posted and maintained a small sign in the powder room, reading "Not responsible for articles left here—San Marcos," which the trial judge found Mrs. Corrigan saw, or should have seen; (Tr. 19)

(k) The room where the coat was placed is "in the public part of said hotel" on the east side of a short hallway leading from the lobby to the dining room; (Tr. 19)

(l) Access to the powder room may be had either through the lobby, the dining room, or the kitchen, as Mrs. Corrigan knew; (Tr. 20)

(m) The trial judge found (on very flimsy evidence, as will hereafter appear) that one of the hotel company's employees had orally warned Mrs. Corrigan that the powder room was not a safe place to leave valuable articles (Tr. 20); nevertheless, the hotel company continued to maintain the coat racks there for the use of its guests (Tr. 37-46);

(n) Mrs. Corrigan did not inform any officer or employee of the hotel that she had placed, or intended to place, her coat in the ladies' room. (Tr. 20.) There were many guests and visitors at the hotel on the night the coat was stolen. Some were known to Mrs. Corrigan and some were strangers. She did not take notice of the numerous fur coats worn or carried out of the hotel by guests and visitors. (Tr. 20-21.) She knew there was a place behind the hotel desk for the safe-keeping of property of guests. (Tr. 21.)

(o) The coat was never recovered. The insurance company paid the Corrigan seven thousand dollars, under the policy above mentioned, and became subrogated to the rights of the Corrigan against the hotel company (Tr. 20) and this action was brought and prosecuted by the Corrigan for the benefit of the insurance company. (Tr. 21.)

From the foregoing facts, the trial judge concluded that Mrs. Corrigan was negligent in leaving her coat in the ladies' room and that her negligence was the proximate cause of the loss of the coat (Tr. 22) and rendered judgment in favor of the hotel company (Tr. 23-24), from which judgment and the denial of the plaintiffs' motion for new trial (Tr. 24; 29) this appeal is prosecuted. (Tr. 30).

SPECIFICATION OF ERRORS

1. The District Court erred in making its finding of fact number 4, which reads:

“4. Plaintiff Clara R. Corrigan, while a guest at the San Marcos Hotel at Chandler, Arizona, on or about February 15, 1948, had and retained in her personal and exclusive custody and control a certain Mink fur coat of the value of approximately Seven Thousand Dollars (\$7,000.00).” (Tr. 19)

for the reason that there is no evidence that Mrs. Corrigan retained the coat in her personal and exclusive custody and control; and all of the evidence in the record is contrary to such finding.

2. The District Court erred in making its finding of fact number fifteen, which reads:

“15. Plaintiff Clara R. Corrigan did not use ordinary or reasonable care in the safekeeping of her fur coat on said day.” (Tr. 21)

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

3. The District Court erred in making its finding of fact number seventeen, which reads:

“17. The proximate cause of the loss of Plaintiff Clara R. Corrigan's coat was the negligence of said Plaintiff, and said loss would not have occurred without such negligence.” (Tr. 21)

for the reason that there is no evidence to support such purported finding, and all of the evidence in the record is contrary to such finding.

4. The District Court erred in making its conclusion of law number one, which reads:

“1. That Plaintiff Clara R. Corrigan was negligent in caring for the fur coat which was lost and to recover for the loss of which this action was instituted, and that the proximate cause of such loss was the negligence of said Plaintiff Clara R. Corrigan.” (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

5. The District Court erred in making its conclusion of law number two, which reads:

“2. That the loss of said fur coat would not have occurred had Plaintiff Clara R. Corrigan exercised ordinary care in its safekeeping.” (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

6. The District Court erred in making its conclusion of law number three, which reads:

“3. That Plaintiffs are not entitled to recover from Defendant for the loss of said fur coat, and that Defendant is entitled to judgment against the Plaintiffs on their Complaint, and for Defendant’s costs incurred herein.” (Tr. 22)

for the reason that such purported conclusion does not state the law applicable to the factual situation presented by the record and there is no evidence in the record to support such erroneous conclusion.

7. The District Court erred in refusing to find as a fact the matter set forth in plaintiffs’ requested finding of fact number IV, which reads:

“IV. That on February 15, 1948, while the plaintiffs were guests of defendant in its hotel at Chandler, Arizona, plaintiff Clara R. Corrigan placed and left said mink coat under the care of said defendant, by leaving the same in the ladies’ powder room adjacent to the dining room of said hotel, said powder room being maintained by defendant and intended by defendant for the use of its guests as a place to leave their coats and other belongings while using the facilities of the dining room and hotel. That on said date, while said mink coat was under the care of defendant, said mink coat was stolen, and it was not, and has not been recovered.” (Tr. 15)

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiffs and the admissions made by the defendant.

8. The District Court erred in refusing to find as a fact the matter set forth in plaintiffs' requested finding of fact number V, which reads:

"V. That at said time and place the plaintiff, Clara R. Corrigan, acted as a reasonably prudent person under the circumstances." (Tr. 15)

for the reason that such requested finding is material and is supported by the uncontradicted evidence on the part of the plaintiffs and the admissions made by the defendant.

9. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiffs' requested conclusion of law number I, which reads:

"I. That this action is controlled by the provisions of Section 62-304, Arizona Code Annotated 1939." (Tr. 16)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

10. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiff's requested conclusion of law number II, which reads:

"II. That the loss involved herein was not occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the plaintiffs, or either of them, or by the act of someone brought into the hotel by the plaintiffs, or either of them." (Tr. 16)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

11. The District Court erred in refusing to conclude, as a matter of law, the matter set forth in plaintiffs' requested conclusion of law number III, which reads:

"III. That plaintiffs are entitled to recover from defendant for the loss of said fur coat the sum of seven thousand dollars (\$7,000.00) for the use and benefit of General Insurance Company of America, and for plaintiffs' costs herein incurred and expended." (Tr. 16-17)

for the reason that the same is a correct statement of the law applicable to the facts presented by the record.

12. The District Court erred in rendering judgment in favor of the defendant and in denying plaintiffs' motion for new trial, because all of the evidence in the case, viewed in the light most favorable to the defendant, fails to disclose any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it as an innkeeper under Section 62-304 of the Arizona Code of 1939.

SUMMARY OF ARGUMENT

The one point urged by the appellants, as applicable to all of the errors heretofore specified, is that all of the evidence in the record, viewed in the light most favorable to the appellee, fails to disclose any negligence upon the part of Mrs. Corrigan that would excuse the hotel company from the liability imposed upon it under the Arizona innkeeper's liability act. (Section 62-304, Arizona Code of 1939.)

With the permission of the court, the argument will be presented under the following sub-headings:

1. Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the existing circumstances, or the doing of that which such a person would not have done under such circumstances.

2. Negligence is always relative to the surrounding circumstances of time, place, and persons.

3. The hotel company could not limit its statutory liability by placing a sign in the powder room reading "Not responsible for articles left here."

4. An oral warning given by a hotel employee to a guest does not relieve the hotelkeeper of his statutory liability.

5. There was no duty on the part of Mrs. Corrigan to notify the hotel company she was leaving her coat in the powder room.

6. A guest has the right to rely upon prevailing custom and the hotel company is bound thereby.

ARGUMENT

1. **Negligence Is the Failure to Do What a Reasonably Prudent Person Would Ordinarily Have Done Under the Existing Circumstances, or the Doing of That Which Such a Person Would Not Have Done Under Such Circumstances.**

The foregoing proposition is supported by the following decisions of the Arizona Supreme Court:

Owl Drug Company vs. Crandall, 52 Ariz. 322, 80 P. 2d 952;

Southern Pacific Company vs. Buntin, 54 Ariz. 180, 94 P. 2d 639;

A. T. & S. F. R. Co. vs. France, 54 Ariz. 140, 94 P. 2d 434;

Scarborough vs. Central Arizona Light & Power Co., 58 Ariz. 51, 117 P. 2d 487, 138 A. L. R. 866.

2. **Negligence Is Always Relative to the Surrounding Circumstances of Time, Place, and Persons.**

In *Southern Pacific Company vs. Buntin*, 54 Ariz. 180, 94 P. 2d 639, the Arizona Supreme Court said:

“ . . . negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually reg-

ulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man, guided by those same considerations would not do; *it is not intrinsic or absolute, but is always relative to the surrounding circumstances of time, place and persons.*" (Emphasis supplied.)

In determining whether or not Mrs. Corrigan was negligent, we cannot be governed solely by the value of the coat which was stolen, but must refer to all the surrounding circumstances of time, place and persons. This loss occurred at an expensive resort hotel which was frequented by people of means. The place of the loss was the hotel powder room which was maintained as a place for ladies to leave their coats, and it was used for this purpose by Mrs. Corrigan. It was unquestionably the custom for the ladies who were guests of the hotel to leave their coats in this place, and it can hardly be said that Mrs. Corrigan was negligent in following this custom of many years' standing by leaving her coat in the place designated for that purpose. *If she was negligent on this occasion, so were approximately two hundred other ladies who had also left their coats, including many valuable furs, in the powder room.* Certainly Mrs. Corrigan acted as a reasonably prudent person would have acted under the circumstances. She followed the standard of conduct set by the other guests.

Not every careless act on the part of a guest may be termed negligence, as pointed out by the Supreme

Court of New Mexico, in *Landrum vs. Harvey*, 28 N. M. 243, 210 P. 104, wherein it is said:

“The placing of rings in the pillow slip for the night cannot be conclusively called negligent. Indeed that would seem a good method of concealment and conducive to safety. Leaving them there and allowing the maid to shake out and remove the linen was careless. But was it negligence in law? If its only result was that the rings thus came to the attention of an employee, who took advantage of the opportunity and stole them, the carelessness was not the cause of the loss.”

To the same general effect, the attention of the court is most respectfully invited to the early case of *Smith vs. Wilson*, 36 Minn. 334, 31 N. W. 176, which contains the following language:

“The fact that, sleeping in a room at the hotel occupied only by himself, the plaintiff retained the sum of \$495 in money secured in a belt around his body, was not such conduct as should be deemed negligence as a matter of law, although the bolt of the door to his room could be opened with a wire from the outside.”

Appellants also invite the attention of the court to *Cunningham vs. Bucky*, 42 W. Va. 671, 26 S. E. 442, which thus states the rule:

“ ‘Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within or unexplained, whether committed by guests, servants, or strangers.’ ‘The

general principle seems to be that the innkeeper guaranties the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guaranty.' Cutler v. Bonney, 30 Mich. 259. 'Proof of the loss by the guest while at the inn is presumptive evidence of negligence on the part of the innkeeper or of his domestics. It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exercise exact care and vigilance over all persons who may come into his house, whether as guests or otherwise. By the common law, he is responsible, not only for the acts of his servants and domestics, but also for the acts of other guests.' Jalie v. Cardinal, 35 Wis. 118. 'Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or week, deprives a person of his character as a traveler and guest if he retains his status as a traveler in other respects.' Id.

"There is no question that the plaintiff was a guest at the defendant's hotel, and that while there, he was robbed in his room while asleep, from within the defendant's family, including his servants. *That he had been drinking, was careless with his money, and trusted in the honesty of defendant's household, and refused the services of Mrs. Bucky as to the care of his money, will not excuse the defendant* from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants, for the protection of the public; and he cannot excuse himself from liability by showing that the servant was

a stranger, and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests. As Judge Dixon says in *Jalie v. Cardinal*, above cited: ‘If drunk, the plaintiff might still have claimed the protection of his host, as did Falstaff when he fell asleep “behind the arras,” and might say with him: “Shall I not take mine ease in mine inn, but I shall have my pocket picked?”’ The plaintiff was taking his ease in his inn under the protecting aegis of his host when he had his pocket picked, evidently by a member of the defendant’s household, for whose good conduct he was guarantor, and for whose malfeasance he was liable to his guests.’ (Emphasis supplied.)

It is also held that if the plaintiff was negligent, but such negligence was discovered by the hotel company, or its servants, in time to have prevented the loss *by the exercise of extraordinary diligence*, the hotel keeper is liable. As an example, appellants quote from *Watson vs. Loughran*, 112 Ga. 837, 38 S. E. 82, thus:

“The main defense urged upon the trial was that, if the plaintiff’s jewelry was stolen, it was in consequence of her own negligence or default, and not that of the defendants. The defendants claimed that she was guilty of such negligence or default, in that, on the day that the loss is alleged to have occurred, she left her room and the hotel, leaving open both the room door and the trunk in which was the jewelry alleged to have been stolen.

Two of the defendants' servants (chambermaids) testified, in substance, that they saw the plaintiff when she left her room on the occasion when the jewels are alleged to have been stolen, and that she left her room door open; that they called her attention to the fact and that it was unsafe so to leave it, but she hurried away, saying that her father was waiting for her, leaving the door still open. One of these chambermaids testified that they both had pass-keys at the time, with which they could have locked the door to the plaintiff's room. The other testified that the pass-keys were in the linen room, a short distance away, on the same floor, and that they got them afterwards; and that she, about an hour and a half after the plaintiff left, while putting the plaintiff's room in order, saw that the trunk was open, and, after finishing her work in the room, she came out and locked the door. Thus, from the defendants' own showing, their servants, after discovering that the plaintiff had gone off without closing and locking the door to her room, and being at once impressed with the idea that it was unsafe for her to do so, allowed the door to remain open for an hour and a half, without making any effort whatever to lock it. These servants were on the scene when the alleged negligence or default of the plaintiff occurred, and, had they taken proper precautions to protect the room and its contents, no unauthorized person could have entered it, during the plaintiff's absence, in consequence of such alleged negligence or default on her part. It did not appear when the jewelry was stolen,—whether during the time that the room door was left open, or after

it had been locked by the chambermaid,—but the defense set up was that it occurred in consequence of the plaintiff having left the door open and the trunk unlocked. Admitting the testimony of these chambermaids to be true, it was not sufficient to relieve the defendants from liability. If the plaintiff went off, leaving the door of her room open, and the theft occurred before the chambermaid locked it, and in consequence of the door being left unlocked, then the defendants would be liable, because the exercise of extraordinary diligence on the part of their servants would have prevented the loss.”

3. The Hotel Company Could Not Limit Its Statutory Liability by Placing a Sign in the Powder Room Reading “Not Responsible for Articles Left Here.”

The Arizona statute here applicable reads as follows:

“62-304. *Liability of innkeeper to guest.*—An innkeeper is liable for all losses of, or injuries to, personal property placed or left by his guests under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one brought into the inn by the guest. If the innkeeper keeps a fire-proof safe, and gives notice to the guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and of small com-

pass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles if not deposited with him and not required by the guest for present use.”

Such statute provides the exclusive method by which a hotel company may be relieved of liability, i.e., by maintaining a fireproof safe and posting a notice with respect thereto in the room occupied by the guest, and then he only relieves himself of his liability for the loss of “money, jewelry, documents and other articles of unusual value and of small compass.”

A case quite similar to that at bar is *Maxwell Operating Company vs. Harper*, 138 Tenn. 640, 200 S. W. 515, wherein it is said:

“The petitioner operates the Maxwell House, one of the leading hotels of Nashville, and as a part of its equipment has a checkroom near the lobby, in which room the overcoats and small baggage of its guests are kept. Harper, at the time a guest of the house, deposited his overcoat in this room for safe-keeping, and received from the attendant a check, in the form of those there customarily in use, as follows:

“ ‘Accommodation Check.

“ ‘Left at owner’s risk. The management will not be responsible for loss or damage. No. 4554.

(Signed) Maxwell Operating Co.’

“Harper had been a patron of the hotel for two or three years, and on numerous occasions; and on

previous visits he had been directed by the clerk and employes of the house to the checkroom as the place in which to deposit such articles. His overcoat in question here was in some way misdelivered or stolen, and he brought this suit to recover its value. Both of the lower courts have given judgment in his favor.

“The defenses of the hotel company are that it maintained a baggageroom in the basement where storage was at its risk; also a place behind the clerk’s desk where articles might be left, the company assuming responsibility; and, further, that the check received by Harper operated as a contractual limitation upon its common-law liability.

“It is conceded, as it must be, that from an early day the rule in this state has been that an innkeeper is excused from liability for the loss of a guest’s baggage or goods only when the loss or injury results from the act of God or is caused by the public enemy, or by the fault, direct or implied, of the guest himself. *Manning v. Wells*, 9 Humph. (28 Tenn.) 746, 51 Am. Dec. 688, and cases in accord.

“We hold on the facts of this case that the attempt to work an abrogation or release of this common-law liability by the handing out of the check was unreasonable.

“The storage room in the basement was for heavy baggage, and it does not appear that the equipment behind the desk was other than a safe for the keeping of valuables. By custom and previous dealings with Harper himself, he was by the

hotel company directed to the checkroom as a fit and the proper repository for his overcoat.

“Obviously, the overcoat was not a thing to be kept as a valuable in a hotel safe. 22 Cyc. 1083, and cases cited.

“A hotel which operates a checkroom in effect invites such use by its guests as Harper made of it; and the hotel company could not validly negative its common-law duty or liability by any such regulation or stipulation. The stipulation in the check was void for unreasonableness, unsupported as it was by a consideration.”

4. An Oral Warning Given by a Hotel Employee to a Guest Does Not Relieve the Hotelkeeper of His Statutory Liability.

Over the objection of the appellants, the trial court found the following to be a fact, established by the evidence:

“Defendant, through its employees, prior to February 15, 1948, had verbally warned the Plaintiff Clara R. Corrigan and other guests that said public powder room was not a safe place to leave valuable articles.” (Tr. 20.)

If there is any support for such finding, it is in the rather unsatisfactory testimony given by Mrs. Elizabeth Hicks, the social director employed by the hotel company, who stated:

“Q. (By Mr. Carson): Did you ever state, Mrs. Hicks, in the presence of either Mr. Corrigan or Mrs. Corrigan, or both of them, or to a group

with which they were present, that the Hotel was not responsible for wraps left there?

“A. Well, not in front of Mr. Corrigan because he didn’t have access to the ladies’ powder room, but Mrs. Corrigan and her friends had beautiful coats. I am not fortunate enough to have one, and I have said more than once when I have been in there, ‘Well, I wouldn’t leave that in here.’ ‘Oh, what is the difference; it is insured,’ and that is their attitude out there. ‘It is insured,’ and it is just like people with a car, we don’t care if it is stolen.

“Mr. Sutter: We object to that on several grounds; one, it is not responsive to the question, and secondly, Mrs. Corrigan has not been present in any statement made, and it is merely a voluntary statement of the witness. We move that the answer be stricken.

“The Court: She made the statement that Mrs. Corrigan was present, but she eliminated Mr. Corrigan. Did you make that statement to Mrs. Corrigan?

“Q. (By Mr. Carson): Did you make that statement in her presence, Mrs. Hicks?

“A. Mrs. Corrigan’s coat was so very beautiful, everyone admired it—

“The Court: No, just answer—

“The Witness: Otherwise, I would not remember whether I said it to Mrs. Corrigan or not. It was a run of the mill understanding.

“Mr. Sutter: I don’t believe the witness has still stated definitely that she made the statement to Mrs. Corrigan. I think she is assuming that

she did, because of the fact that Mrs. Corrigan had a nice coat.

“The Court: All right.

“Mr. Sutter: I renew my objection on that ground.

“Mr. Carson: Referring to these statements that you have made, Mrs. Hicks, to the various guests at various times, can you recall having made those statements or statements of similar import in the presence of Mrs. Corrigan?

“A. She would be one of the main reasons for making that statement.

“Q. Did you make that statement to her?

“A. I am quite certain that I did, because there was a certain group that have always left their coats in there before dinner and throughout the evening.

“Q. And Mrs. Corrigan was a member of that group?

“A. Yes, she was.

“Q. And in the presence of that group of which Mrs. Corrigan was a member, you have then made the statement?

“A. I certainly have.” (Tr. 99-101.)

“Q. Mrs. Hicks, you stated that on occasions you had made the statement to a group of which Mrs. Corrigan was a member, that if you were there you would not leave your coat in the powder room, or words to that effect?

“A. That is right.

“Q. On what occasions did you make those statements?

“A. Before dinner, when we come from cocktail parties, before dinner when they are taking their wraps off and hanging them up.

“Q. Do you recall on what occasion Mrs. Corrigan was present when you made such a statement to that group?

“A. I have no reason to remember the date. It would be very fishy if I did. I would have no occasion to remember a date like that.

“Q. To the best of your recollection, then, you merely made the statement to a group of ladies?

“A. That is right.

“Q. And Mrs. Corrigan at one time or another associated with that group?

“A. That is right.

“Q. Are you therefore assuming that Mrs. Corrigan was present on one of those occasions, or do you know of your own knowledge that she was present on those occasions?

“A. I am as certain as anyone could be on something that happened that has no particular significance with which it did happen, because that coat was such a beautiful coat that I know that she was among those to which I said, ‘I would not leave it if it were mine.’

“Q. You are basing your recollection on her presence on the fact she had a beautiful mink coat?

“A. That is right, and she would be one of the people that I would want to be careful, and she is one of those people that have so much, is very careless because it is insured.

“Mr. Sutter: We object to that last answer and move that it be stricken.

“The Court: All right, that last observation will go out.

“Mr. Sutter: That is all.” (Tr. 103-104.)

But, even assuming that such finding does have some support in the record, how can it aid the appellee?

As pointed out under the foregoing subheading numbered “3”, there is an exclusive statutory method by which an innkeeper may limit his liability, or be relieved of it.

An oral warning by a social director is not mentioned or sanctioned by the Arizona statute, nor can such a warning establish negligence upon the part of guests when the hotel company itself maintained the powder room and provided the coat hangers and racks therein and knew of the custom on the part of guests for many years to leave valuable coats in such room.

The trial judge erred when he adopted the standard of conduct fixed by Mrs. Hicks, rather than the standard of conduct fixed by other guests similarly situated and in similar circumstances to the Corrigans.

The hotel company felt there was no danger in the leaving of coats in the powder room, except when “public dances” were given at the hotel. Then it employed an attendant to guard the coats. Mr. John Quarte, general manager of the hotel, testified:

“Q. Is that powder room attended during meal hours?

“A. The powder room is never attended. The only time we attend that, put an attendant in the powder room, is when we have a public dance, we have three or four dances during the season, and that is the only time we have an attendant, but for daily use of the guests, daily use, we do not have attendants.” (Tr. 94.)

5. There was No Duty on the Part of Mrs. Corrigan to Notify the Hotel Company She was Leaving Her Coat in the Powder Room.

Appellee knew that guests customarily left their coats in the powder room. Mr. John Quarte, the general manager of the hotel, testified:

“Q. Mr. Quarte, in connection with the hotel, there is a dining room operated, is there not?

“A. That is right.

“Q. Does the Hotel provide any facilities for the use by patrons of the dining room and guests of the hotel that use the dining room in the way of a place for guests to leave wraps?

“A. We have a room connected with the ladies' powder room where guests choose to leave their wraps on occasions.

“Q. In the ladies' powder room are there any facilities particularly designed for that purpose?

“A. There is a coat rack there for those wishing to leave their wraps or things.

“Q. Is that a long horizontal bar on a stand?

“A. Yes, it is about seven feet wide—long, I should say.

“Q. On that did you have individual coat hangers for the use of the guests?

“A. Yes.” (Tr. 37.)

“Q. Do all of your guests always leave their wraps in the powder room whenever they go into the dining room?

“A. No, sir; some do and some don't. Some take them right in the dining room with them, and hang them over the chair while they are having their dinner.

“Q. After the guests leave the dining room, do some of them who sit in the hotel lobby for a time after their meal always leave their coats in the powder room?

“A. No, sir. Quite a few of them take them out and wear them in the lobby, due to the drafts with the doors opening and closing, and so on. Quite a few take their coats out of the powder room.” (Tr. 96-97.)

Guests occupying the hotel cottages, as the Corrigans did, and who wore their coats when walking outside from the cottage to the dining room, then had their choice, according to Quarte, of hanging their coats on the back of their dining room chair or placing them in the powder room on the rack provided by the hotel.

A case somewhat in point is *Swanner vs. Conner Hotel Company*, decided by the Springfield (Mo.) Court of Appeals, and reported in 224 S. W. 123, wherein it is said:

“Plaintiff, a traveling salesman, went to the Conner Hotel in Joplin about 11:30 a.m. on a certain day in May, 1919, to obtain a room as a guest. He was familiar with the hotel, having worked prior to that time for a taxicab company that had a stand in the hotel. On entering the hotel plaintiff went directly to the bell boys’ bench, where it was the custom to leave grips, and set his grip by the bench. On previous occasions when plaintiff was a guest at this hotel he had seen the bell boy set his grip by this bench, and had seen the grips of other guests set by this bench. He then went to the desk and asked for a room, and there was no room vacant. He afterwards ate lunch in the hotel. After lunch plaintiff went away, but returned about 5:30 p.m. No room was vacant then, but would be ‘before the evening was up.’ After 10 p.m. plaintiff succeeded in getting a room, registered, looked for his grip, and it was gone. None of the bell boys handled his grip or knew it was there so far as the record shows. He did not call the attention of any one connected with the hotel that he had a grip. He merely went in and set his grip where he knew it was the custom to set grips while the guest was registering and securing a room. The defendant maintained a check room in the hotel, and plaintiff knew of this fact, and knew where it was. He could have checked his grip without cost, and without inconvenience, as the check room was near the clerk’s desk, and only about 20 feet from the place where plaintiff set his grip. An attendant was in the check room at the time plaintiff entered the hotel, and at all other times, ready to check plaintiff’s or any other

guest's grip. Plaintiff never looked for his grip, nor gave it any attention from the time he set it down until after 10 o'clock that night. . . .

"Defendant urges that plaintiff's baggage was never *infra hospitium*, that is, in the care and under the custody of the innkeeper, and that therefore no liability attached. As stated, the fact that plaintiff was a guest is not questioned. He had put his baggage where it was customary to put baggage while a guest was registering and seeing about a room. Plaintiff did not register immediately after setting his grip by the bell boys' bench, but would have then had there been a room. He was told there would be a room, and he waited for the room. His baggage was where it should have been at least up to the time he asked for and failed to get a room."

Judgment in favor of the traveling salesman was, accordingly, affirmed.

6. A Guest Has the Right to Rely Upon Prevailing Custom and the Hotel Company Is Bound Thereby.

If Mrs. Corrigan had taken her coat into some cheap hotel on skid row and left it in an unattended room, appellants might be able to agree with the appellee and the trial judge that she was guilty of negligence.

The same conduct at the San Marcos, however, does not constitute negligence. She had left her coats in the powder room over a period of seven years, without mishap. The other lady guests did the same thing.

It was a general custom upon which she had the right to rely.

While the record does not so disclose (because the trial judge was thoroughly familiar with the situation) the San Marcos is admittedly one of the nicest winter tourist hotels in the southwest. About the only time common folks are able to partake of its hospitality is at the close of the tourist season, when for two days the State Bar of Arizona holds its annual convention at the hostelry.

(Through that medium, even the authors of this brief have had a chance to observe the interior of the establishment.)

A case recognizing the distinction between conduct required in an expensive hotel, as contrasted with a cheaper one, is *Burton vs. Drake Hotel Company*, 237 Ill. App. 76.

It is submitted that Mrs. Corrigan had the right to rely upon the general custom followed by the other guests, and by her over a long period of time, of leaving her coat upon the hanger provided by the hotel in the powder room furnished and maintained by the hotel. While not precisely in point, it is felt the decision in *Keith vs. Atkinson*, 48 Colo. 480, 111 P. 55, may be of some assistance to the court, for in that case it is said:

“And, under the circumstances of this case, if such a system or custom was in general use, and

such an undertaking was consistent with what a traveling guest had a right to expect in accordance with the rules and usage prevailing generally at similar hotels, and no notice was brought to the attention of the guest to the contrary, then he was justified in making such disposition of his check, and should have been allowed to show that such a general usage and custom prevailed."

CONCLUSION

For the reasons above given, it is most respectfully insisted that the cause should be reversed, with instructions to the District Court to enter judgment in favor of the plaintiffs, as demanded in the complaint.

Respectfully submitted,

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No. 12410

**United States
Court of Appeals
For the Ninth Circuit**

**L. F. CORRIGAN, and CLARA R.
CORRIGAN, who sue on behalf of
General Insurance Company of Amer-
ica, a corporation,**

Appellants,

vs.

**SAN MARCOS HOTEL COMPANY,
a corporation,**

Appellee.

Brief of Appellee

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SUBJECT INDEX

	Page
Statement of the Case.....	1
Argument Concerning Use of Depositions.....	4
Comment on Appellants' Specifications of Errors....	7
Summary of Argument	7
Argument	8
I. Weight of Findings by Trial Court.....	8
II. Answer to Appellants' Arguments.....	15
(a) Answer to Appellants' Arguments Con- cerning Negligence	15
(b) Answer to Remainder of Appellants' Argument	25
III. Conclusion	27

TABLE OF CASES AND AUTHORITIES CITED

	Page
Arizona Code Annotated, 1939, Section 62-304....	3, 7, 10
Burton v. Drake Hotel Company, 237 Ill. App. 76....	27
City of San Diego v. Perry et al, 9th Cir., 124 F. 2d 629	9
Corpus Juris Secundum, Vol. 43, pp. 1155-1156, Innkeepers, Sec. 14	25
Cunningham v. Bucky, 42 W. Va. 671, 26 S.E. 442..	16
Federal Rules of Civil Procedure, Rule 26 (d) (3), (28 U.S.C.A., following Section 723).....	4, 6
Federal Rules of Civil Procedure, Rule 52 (a), (28 U.S.C.A., following Section 723).....	8
Fuller v. Coates et al., 18 Ohio State Reports 343.....	19
Grip Nut Company v. Sharp, 7th Cir., 150 F. 2d 192	10
Keith v. Atkinson, 48 Colo. 480, 111 Pac. 55.....	28
Landrum v. Harvey, 28 N.M. 243, 210 Pac. 104.....	16
Maxwell Operating Company v. Harper, 138 Tenn. 640, 200 S.W. 515	25, 26
Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560	24
Smith v. Wilson, 36 Minn. 334, 31 N.W. 176.....	16
Springman v. Gary State Bank, 7th Cir., 124 F. 2d 678	9
Swanner v. Conner Hotel Company, 224 S.W. 123	17, 26
Vance v. Throckmorton, (Ky.) 5 Bush, 41, 96 Am. Dec. 327	15
Watson v. Loughran, 112 Ga. 837, 38 S.E. 82.....	16
Wittmayer et ux. v. United States, 9th Cir., 118 F. 2d 808	8

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Brief of Appellee

In this brief the parties will be referred to by their designations in the District Court, viz: Appellants as plaintiffs and Appellee as defendant, or by name. References to the printed transcript of record will be indicated by the abbreviation "Tr." followed by numerals denoting the page numbers.

Statement of the Case

Plaintiffs set forth the facts they assert are established by the record in separate paragraphs on pages 2 to 6, inclusive, of Appellants' Opening Brief. Except for defendant's position concerning the admissibility

at the trial of the depositions of plaintiffs Corrigan, which position is hereinafter stated and argued, defendant differs with plaintiffs' statement of the case only in the following instances:

(1) Defendant in its answer (Tr. 6) and at the trial denied that plaintiffs ever, at any time material to this action, placed or left a coat under the care of defendant, and in its finding of fact number 4 the trial court found as a fact that Mrs. Corrigan had a mink coat which she retained in her personal and exclusive custody and control. (Tr. 19, 49, 50, 66) Defendant also maintained successfully that if a coat was lost by or stolen from Mrs. Corrigan this was occasioned by her negligence. (Tr. 6, 21, 22) The trial court found this to be a fact. (Tr. 21)

(2) There is only *one* coat rack in the "powder room" referred to in paragraph (c) on page 3 of Appellants' Opening Brief, and on this rack are individual coat hangers. This coat rack is approximately eighty-four inches long. (Tr. 37, 46)

(3) Contrary to the statement in paragraph (d) on page 3 of Appellants' Opening Brief that defendant knew of Mrs. Corrigan's custom of leaving her coat in the powder room while eating, it appears, and the court found, that Mrs. Corrigan had never informed defendant that she was in the habit of leaving her coat in the powder room, nor did she inform defendant the night of February 15, 1948 that her coat was in the powder room. (Tr. 20, 49, 54)

(4) Paragraph (f) on page 4 of Appellants' Opening Brief is inaccurate insofar as it is stated that it was the *general* custom to leave coats in the powder room, since the record indicates that such was the custom only of *some* or a *few* of the guests. (Tr. 37, 96, 97)

(5) Defendant does not concede that, as stated in paragraph (i) on page 5 of Appellants' Opening Brief, and as testified by Mrs. Corrigan (Tr. 58), there were approximately two hundred coats hanging on the eighty-four inch coat rack in the powder room on the night in question. The trial court did not so find, and the testimony is patently unreasonable.

(6) Defendant does not concur in the criticism of the trial judge interjected by appellants into paragraph (m) on page 5 of their opening brief.

(7) Mrs. Corrigan did not return to the powder room between the hours of 7:15 o'clock and 10:15 o'clock on the evening in question, nor did she check as to the safety or whereabouts of her coat during those hours. (Tr. 20-21) This is not mentioned by plaintiffs.

(8) The trial judge found as facts that Mrs. Corrigan was negligent in caring for her coat, and that her loss would not have occurred without her negligence. (Tr. 21)

If the trial court's finding of negligence is upheld, or if his finding that the coat was not lost or stolen while under the care of defendant is upheld, then, and in either event, the judgment of the district court must be affirmed.

Plaintiffs have designated as the only point on which they intend to rely their assertion that the evidence does not support the finding that Mrs. Corrigan was negligent so as to excuse defendant from liability under Section 62-304, Arizona Code Annotated, 1939. (Tr. 109) However, in their specifications of error number 1 plaintiffs now attack the finding that Mrs. Corrigan

had and retained her coat in her personal and exclusive custody and control.

The issue presented by the appeal, then, is twofold: Are these two findings so clearly erroneous that they must be set aside? If there is evidence to reasonably support either of these findings the appeal must fail.

Argument Concerning Use of Depositions

At the trial defendant objected to the use of the depositions of Mr. and Mrs. Corrigan upon the grounds that such use was not permissible under the provisions of Rule 26 (d) of the Federal Rules of Civil Procedure (28 U.S.C.A. following section 723). Defendant stipulated that the depositions might be taken (Tr. 42, 43), but specifically notified plaintiffs that the right to object to the depositions at the trial was reserved (Tr. 44), and plaintiffs could in no way have been misled by the fact that defendant consented to the taking of the depositions.

In order for use of the depositions to have been permissible at the trial of this action it must have appeared that one of the provisions referred to in Rule 26 (d) (3) of the Federal Rules of Civil Procedure had been complied with. Rule 26 (d) (3) is as follows:

“Rule 26. *Depositions Pending Action.*

* * *

“(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had

due notice thereof, in accordance with any one of the following provisions:

* * *

“(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, *unless it appears that the absence of the witness was procured by the party offering the deposition*; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. * * *” (emphasis added)

Obviously, there could be no basis for a finding by the court that any of the foregoing conditions existed, and the court did not so find. All that does appear affirmatively is that Mr. and Mrs. Corrigan had reservations at the San Marcos Hotel until Tuesday, March 1, 1949, the date of the trial (Tr. 92, 93); that their depositions were taken on the preceding Wednesday, February 23, 1949, (Tr. 43) and that they left the hotel, presumably for Dallas, on the intervening Sunday, February 27, 1949, two days before the trial, for reasons not yet disclosed. (Tr. 39) Clearly, they procured their own absence.

In argument against the objection plaintiffs stated that defendant had had opportunity to cross-examine and would not be hurt by use of the depositions. This

observation is of no consequence for several reasons: (1) Defendant carefully reserved the right to object to the use of the depositions at the trial. (2) The depositions could be used only if Rule 26 (d) (3), *supra*, so permitted, and this it did not and does not do. (3) Consent to and appearance at a deposition for purposes of discovery in accordance with present practice is quite a different thing from consenting to the use of depositions at a trial in lieu of actual testimony. (4) Defendant was entitled, in the absence of extraordinary circumstances, to have the trier of facts observe Mr. and Mrs. Corrigan and their mannerisms and manner of testifying. (5) A detailed investigation and inquiry by defendant was called for by the peculiar circumstances, among which is the fact that it was through Mr. Corrigan's office that the coat was insured with plaintiff insurance company and the loss was paid (Tr. 70, 74), and this appeared from documents exhibited to defendant's counsel (Tr. 79).

The trial court admitted the depositions "subject to the objection". (Tr. 42) Since the trial was to the court sitting without a jury the court could properly reserve its final ruling on defendant's objection. Defendant submits that the court would have been wholly justified in refusing to consider the depositions in its deliberation, and that the depositions should not be considered on this appeal.

Having stated its position with regard to the use of the depositions, defendant, without waiving this point, will meet and refute the arguments advanced by plaintiffs in their opening brief, and only for such purpose will refer to the depositions of Mr. and Mrs. Corrigan. It is defendant's contention that the judgment

of the District Court must be affirmed whether or not the Corrigan depositions are considered.

Comment on Appellants' Specifications of Errors

Analysis discloses that plaintiffs' specifications of errors, appearing on pages 7 to 11 of their opening brief, actually, with a single exception, are specifications of the points at which plaintiffs differ with the trial court in its determination of questions of fact. The exception is specification number 9 on page 10 of plaintiff's opening brief, to the effect that the District Court erred in refusing to conclude, as a matter of law, that this action is controlled by Section 62-304, Arizona Code Annotated, 1939. Defendant concedes that this statute is controlling, and defendant represents that the District Court correctly applied the statute in determining the case and that the only alleged errors plaintiffs can assert are their differences with the District Court's determination of the facts to which the statute was applied. Plaintiffs so indicate in their Summary of Argument and in their Statement of Points to be relied on. (Tr. 109)

Summary of Argument

The argument on behalf of defendant and appellee will be presented under the following sub-headings:

I. Weight of Findings by Trial Court.

(a) In cases tried upon the facts by the District Court without a jury the findings of fact by the trial judge are to be accepted on appeal, and if there is any testimony consistent with a finding it must be treated as unassailable, unless clearly erroneous.

(b) Negligence is a question to be determined by the

trier of the facts, that is to say, by the jury if there be a jury or by the trial judge if there is no jury.

(c) The primary function of the trial court is to find the facts by weighing the evidence and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable, and this function will be respected on appeal.

II. *Answer to Appellants' Arguments.*

(a) Answer to Appellants' Arguments Concerning Negligence.

(b) Answer to Remainder of Appellants' Argument.

III. *Conclusion.*

ARGUMENT

I. *Weight of Findings by Trial Court.*

(a) *In cases tried upon the facts by the District Court without a jury the findings of fact by the trial judge are to be accepted on appeal, and if there is any testimony consistent with a finding it must be treated as unassailable, unless clearly erroneous.*

The foregoing proposition is axiomatic and is embodied in Rule 52 (a) of the Federal Rules of Civil Procedure (28 U.S.C.A. following section 723c). The proposition repeatedly has been reaffirmed and reasserted by this Court, which stated, in *Wittmayer et ux. v. United States*, 9th Cir., 118 F. 2d 808, 811:

“The findings of the trial court fall within the familiar rule, that where based on conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. * * *

“The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. * * *

“As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S.Ct. 169, 170, * * * the case is pre-eminently one for the application of the practical rule, that *so far * * * ‘as there is any testimony consistent with the finding, it must be treated as unassailable.’*” (emphasis added)

(b) *Negligence is a question to be determined by the trier of the facts, that is to say, by the jury if there be a jury or by the trial judge if there is no jury.*

Negligence is indisputably a question of fact. If there be a jury it ordinarily is determined by the jury in accordance with instructions. If there is no jury the trial judge is of course the trier of facts, including negligence. In a sense negligence is an ultimate fact, or a conclusion of fact, determined by inferences from other facts. In *City of San Diego v. Perry et al.*, 9th Cir., 124 F. 2d 629, the trial court, sitting without a jury, found negligence by inference from undisputed facts. On appeal, since the inference was a reasonable one and not clearly wrong, this finding was upheld although a contrary finding also might have been considered reasonable.

(c) *The primary function of the trial court is to find the facts by weighing the evidence and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable, and this function will be respected on appeal.*

This proposition is well stated in *Springman v. Gary State Bank*, 7th Cir., 124 F. 2d 678, 681:

“* * * The credibility of the witnesses, *the inferences to be drawn from the testimony*, and the weight to be given the evidence are purely questions of fact. We are not the triers of fact, but merely reviewers of the action of the trial court and in our investigation we are limited to an ascertainment of the existence of substantial evidence sufficient to support the findings and where there is any competent evidence to sustain the trial court’s findings, they cannot be disturbed on appeal unless we can say they are clearly erroneous.” (emphasis added)

And it is also stated in the following language in *Grip Nut Co. v. Sharp*, 7th Cir., 150 F. 2d 192, 196:

“It is to be remembered that the trial court has the primary function of finding the facts, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it deems most reasonable.”

With the foregoing propositions in mind we must proceed to examine the evidence to determine whether the findings by the District Court that Mrs. Corrigan had and retained her coat in her personal and exclusive custody and control (Tr. 19), and that she did not use ordinary or reasonable care in the safekeeping of her coat and the proximate cause of its loss was her negligence (Tr. 21), are so clearly erroneous that they can be set aside.

First, as to her retention of exclusive custody and control of the coat, it has been observed that unless the coat was placed or left by Mrs. Corrigan under the care of defendant, plaintiffs cannot recover.

The applicable Arizona statute is as follows:

“62-304. Liability of innkeeper to guest.—An innkeeper is liable for all losses of, or injuries to, per-

sonal property *placed or left by his guests under his care, unless occasioned* by an irresistible, superhuman cause, by a public enemy, *by the negligence of the owner*, or by the act of some one brought into the inn by the guest. If the innkeeper keeps a fireproof safe, and gives notice to the guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and of small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or any injury to such articles if not deposited with him and not required by the guest for present use.” (emphasis added)

Mrs. Corrigan’s own testimony reveals her intentions and understanding with respect to the custody, control and care of her coat, even though the testimony is somewhat lacking in directness. It is:

“Q Did you ordinarily keep this coat in your accommodation, in the dressing room or bedroom?

A Yes.

Q Had you ever turned it over to any employee or representative of the hotel?

A Never.

Q Did you at all times keep the coat in your own exclusive custody?

A Yes. Other than when I would take it to the —would leave it in the cloak-room or the ladies’ room.

Q The coat in other words was always under your direct personal and exclusive control?

A Yes.

Q And did you ever leave in other places in the hotel besides in the—

A No.

Q Powder room?

A No. Other than in my own room. Often times I wore it into the lounge but it would be around my shoulders. I never left it.

Q Did you ever take it off in the lounge?

A I imagine I did, but I never left it.

Q Did anybody at the hotel, any representative of the hotel ever attempt to tell you what you should do with your coat.

A Well, no, not that I can remember.

Q You did then just as you pleased with it?

A Well, it was a custom—we have been going there many years. It was a custom; that was the place the ladies left their coats.

Q I understand. You did with your coat whatever you pleased. Whatever you yourself decided to do with the coat you did without any direction from any person at the hotel, is that right?

A I am not sure that I understand your question.

Q Your coat was worn or placed somewhere at your own discretion however you saw fit to wear it or wherever you saw fit to leave it was what was done with the coat at all times?

A I wouldn't say wherever I saw fit to leave it. I would say that I left it in the customary place.

Q If you had wanted to leave it on a chair in the lounge, you would have done that?

A That would have been my privilege, yes.

Q In other words, the coat was yours to do with and you did do as you saw fit?

A Sure. (Tr. 49-50)

“Q Where did you store your luggage while you were a guest at the hotel?

A In my cottage.

Q You kept it in your cottage?

A Yes.

Q Did you ever check any articles with the hotel?

A No.

Q You at all times kept them in your room or wherever you were?

A Yes. (Tr. 52)

* * * *

“Q Did you have other coats of comparable value?

A No, I didn't have another coat with me as valuable as that one, or half as valuable. I had several coats with me.

Q Did you keep all of your jewelry in your room there at the hotel?

A Yes.

Q You never did deposit that with the management?

A No.

Q There is a vault there available for deposit of valuable articles, is there not?

A That I don't know because I have never—

Q You have never read a notice to the effect—

A Never asked the question.

Q Have you ever read a notice at the hotel to the effect that they keep a safe deposit box?

A Yes, I believe I have read that. I wouldn't swear to that because I don't remember.

Q That is your present recollection. You have some recollection of having read a notice?

A Some recollection there is a notice there.

Q You never did deposit any of your articles with the hotel?

A No, I lock them in my own room.

Q It being your intention or feeling you could look after your property just as well as the hotel?

A Well, I don't know that I ever analyzed it.

Q You just felt that you would rather have them with you?

A I just kept them is all. (Tr. 63-64)

* * * *

“Q You have been spending your winters at the San Marcos for several years?

A Yes, seven to be exact.

Q Seven?

A Yes. This is the seventh—

Q This year is the seventh trip there?

A Yes.

Q And during that time you have never given any jewelry or clothing, luggage into the direct custody of the hotel?

A Not that I recall.

Q How did you—

A I may have in the first years, but I don't recall it.” (Tr. 66)

It appears that in her own mind Mrs. Corrigan believed that she retained personal custody and control of all of her effects, and her actions so indicate. The

question can be determined only by ascertaining Mrs. Corrigan's intentions. *Vance v. Throckmorton*, (Ky.) 5 Bush, 41, 96 Am. Dec. 327. The reasonable conclusion appears to be that the trial court's finding is correct. Certainly the trial court's finding is supported by substantial evidence.

II. *Answer to Appellants' Arguments.*

The bulk of Appellants' Opening Brief is devoted to argument for their contention that Mrs. Corrigan was not negligent, and defendant, in the interest of brevity, will combine its answer on the question of negligence with the application of the principles stated in the foregoing argument concerning the weight of findings by the trial court.

Appellants concede, of course, that negligence on the part of Mrs. Corrigan which proximately contributed to her loss, and without which the loss would not have occurred, is a defense to their claim. It remains only to determine whether the trial court's findings in this respect were so clearly erroneous that they must be set aside.

(a) *Answer to Appellants' Arguments Concerning Negligence.*

Defendant has no quarrel with plaintiffs' general definitions of negligence, which are stated under the first two subheadings in plaintiffs' argument. Defendant concedes and asserts that the test of the reasonably prudent person must be applied in the light of *all* of the surrounding circumstances, and that negligence is relative to *all* of the surrounding circumstances. Defendant does differ with plaintiffs as to the application of these principles.

First, it must be pointed out that *none* of the cases cited by plaintiffs on the question of negligence is in point.

Landrum v. Harvey, 28 N.M. 243, 210 Pac. 104, concerned a situation where the guest placed her rings in the pillow slip *in her room* and was personally present when a maid was changing the linen and removing it, and where the linen was taken by *hotel employees* and sorted, the rings disappearing somewhere along the line. The lower court directed a verdict for the hotel, but the appellate court held that the guest's carelessness could not *conclusively* be called negligence and that the issue of negligence should have been submitted to the jury.

Plaintiffs also cite *Smith v. Wilson*, 36 Minn. 334, 31 N.W. 176, in which it appears that the guest was robbed, while *sleeping in his room* behind a door which was bolted but could be opened with a wire from the outside, of money which was in a money belt fastened around his waist. The jury in the trial court had found that this was not negligence, and the appellate court held that it was not necessarily negligence *as a matter of law* and allowed the jury's verdict to stand.

In *Cunningham v. Bucky*, 42 W. Va. 671, 26 S.E. 442, also cited by plaintiffs, it appears indisputably that the guest was robbed *in his room*, while sleeping, *by one of the innkeeper's servants*, and the court held that the innkeeper was a guarantor of his servants' honesty.

In *Watson v. Loughran*, 112 Ga. 837, 38 S.E. 82, from which plaintiffs also quote, the facts were that the guest's jewelry was stolen from an unlocked trunk *in her room*, which was also unlocked, that two of the hotel's maids saw the guest leave the door open, and

that the maids had passkeys and could have locked the door, but failed to do so. The court held that the hotel, through its employees, was grossly negligent in not locking the room, the inference being that if the maids had not seen the guest's neglect the result might have been different.

In every one of the above cases the property disappeared from the guest's room.

Plaintiffs at another point in their opening brief cite, upon the question of custom, the case of *Swanner v. Conner Hotel Company*, Mo. App., 224 S.W. 123. There the guest, formerly a cab driver with a stand at the hotel, had seen employees of the hotel set the bags of guests while the guests were registering at the bell-boys' station, and this was the general custom of the hotel, which the guest had observed while a cab driver and while a guest. On the occasion in question he followed the hotel's custom and set his bag near the bell-boys' bench without notifying the hotel he had done so. When he returned for the bag many hours later it was gone. The defendant hotel, at the close of plaintiff's case, *demurred to this evidence*, which action required that the evidence be construed as strongly as possible in favor of the guest, and judgment was entered for the guest. The majority of the appellate court affirmed the judgment, saying, "We do not think that plaintiff's negligence was any more than a question for the trier of the facts" (224 S.W. 123, 124). However, there was a very strong dissent.

The situation presented by this appeal is entirely different from any of the foregoing: Mrs. Corrigan's coat was known by her to be worth \$8,000.00 to \$10,000.00, an obviously unusually high value for a coat. (Tr. 47) She left this coat in the powder room at the

San Marcos Hotel at or about 7:15 o'clock in the evening (Tr. 19, 45) and did not concern herself with its safety until 10:15 or 10:30 o'clock. (Tr. 20-21, 62) She told no one at the hotel she had left her coat there. (Tr. 20, 54) After eating dinner she went directly to the hotel lobby and remained there until she went for her coat around 10:30 o'clock. (Tr. 20, 55) From where she sat in the lobby Mrs. Corrigan could not see the powder room. (Tr. 55-56) She knew the powder room was unattended (Tr. 19-20, 51); she had seen the hotel's sign indicating that the powder room was not a proper place to leave articles. (Tr. 19, 51-52, 93-94); she knew there were many strangers and outsiders frequenting the hotel that night (Tr. 20-21, 61), but she took no notice of coats worn out of the hotel (Tr. 21, 58); she knew that there were several means of access to the powder room (Tr. 20, 56-57); she knew that the hotel would take care of the coat for her if she delivered it to a hotel employee (Tr. 21, 63, 66); and Mrs. Corrigan had been verbally warned about leaving property in the powder room (Tr. 20, 101). Mrs. Corrigan had never been told by any employee of the hotel to leave wraps in the powder room (Tr. 49), and it was *not* the general custom of all of the guests to do so (Tr. 96-97).

Defendant agrees with the trial court's finding of fact that Mrs. Corrigan did not, in view of all of the circumstances, act with respect to her coat as a reasonable and prudent person, guided by those considerations which usually regulate the conduct of human affairs, would have acted. Certainly, this finding is supported by the evidence, and is not clearly erroneous.

The question of an innkeeper's liability in earlier days was frequently before the courts, which then applied a strict common law doctrine not wholly in keep-

ing with present conditions. However, even in these old cases, where the strict common law doctrine was imposed on the innkeeper, negligence such as Mrs. Corrigan's was a complete defense.

An early case from Ohio is particularly appropriate and contains a well-written and logical discussion, and it is believed it will be helpful to the court to quote from this opinion, *Fuller v. Coates et al.*, 18 Ohio State Reports 343. The facts, briefly, were that: the guest hung his coat on a hook on the wall leading to the dining room, where he ate breakfast, and upon his return the coat was missing; the guest told no one he had hung his coat there; the hotel claimed to have posted notices that it would not be responsible for articles not left in the office, but the guest claimed not to have seen the notices; the hotel had a place to keep articles in the office. The case was tried to a jury which found for the defendant, and the trial court's instructions are of interest here. We quote as follows from *Fuller v. Coates et al.*, supra, beginning at page 345 of 18 Ohio State Reports:

“ * * *

The court charged the jury as follows:

‘1. An innkeeper is liable as an insurer of the goods of his guest committed to his care, against everything but the act of God or the public enemy, or the fraud or neglect of the guest himself, or his own servants or his traveling companion. The innkeeper is liable for a loss occasioned by his own servants, by his other guests, by robbery or burglary, or by rioters or mobs.

“ ‘As it is not claimed that an act of God, the public enemy, the traveling companion or servant of the guest, occasioned the loss in this case, the only question for your consideration is, whether the plain-

tiff's own negligence caused, or directly contributed to, the loss of the property.'

“ ‘2. In legal contemplation, the property of a guest within the rooms of a public hotel, is in the possession and under the control of the landlord or proprietor, in such a sense as to place it in his care, and subject him to responsibility for its loss, unless the guest, or his servant, or agent, or traveling companion, has it in his own personal and exclusive keeping and care.’

“ ‘3. If the coat was not left in the care or custody of the landlord, or his agents and servants, but was in the sole and exclusive keeping and custody of the plaintiff, at the time of the loss, the defendants are not liable for its loss, it not being claimed that it was taken from the plaintiff's room.’ * * *

“ ‘7. If the coat was taken into the plaintiff's own personal custody, and put or kept by him in a place not designated by the defendants, or their servants, and not kept for such purposes, and the attention of the defendants, one or any of their servants, was not called to it; and it was an unusual and manifestly hazardous and improper place to lay or hang such an article, and it was thereby lost, the defendants are not liable for such loss.’

“ ‘8. If you find from the evidence that the coat was lost by reason of the negligence of the plaintiff to exercise ordinary care for its safety, it is admitted by the counsel that the defendants are not responsible for its loss. But the duty of determining what would constitute ordinary care in the premises, is to be determined by you in view of all the facts and circumstances of the case. You may take into consideration the throng of comers and goers, or the sparseness of population in the vicinity of the hotel, and taking also into consideration that the guest has a right, at all times, to presume that the innkeeper is exercising such care

of the baggage of his guest as the law requires him to exercise.' * * *

“By a statute of this State, the common law responsibility of innkeepers, as to all goods therein enumerated, is materially modified. The goods sued for in this case are not mentioned in the act; it has, therefore, no application to the case, further than the reason of the legislative policy on which it is based may be regarded in deciding between conflicting constructions of the rules of the common law, by which this case must be determined.

“It is claimed that the common law makes an innkeeper an insurer of the goods of his guest, as it does a common carrier of goods, against all loss, except that occasioned by act of God or the public enemy.

“The rules of the law controlling both these classes of liability have their foundation in considerations of public utility; but it does not therefore follow that the rule in every case is precisely the same. It would seem rather, that, where the circumstances of the two classes differ, public utility might reasonably require a corresponding modification of the rules applicable to the case.

“Common carriers ordinarily have the entire custody and control of the goods entrusted to them, with every opportunity for undiscoverable negligence and fraud; and are, therefore, held to the most rigid rules of liability. Innkeepers may have no such custody of the goods of their guests. In many instances, their custody of the goods is mixed with that of the guest. In such cases, it would be but reasonable that the guest, on his part, should not be negligent of the care of his goods, if he would hold another responsible for them. The case of a carrier and that of an innkeeper are analogous; but, to make them alike, the goods of the guest must be surrendered to the actual custody of

the innkeeper; then the rule would, undoubtedly, be the same in both cases.

“We are not, however, disposed to relax the rules of liability applicable to innkeepers, nor to declare that they are different from those applying to carriers, further than a difference of circumstances between innkeeper and guest may reasonably necessitate some care on the part of the latter.

“The charge of the court below is not inconsistent with a recognition of the same extent of liability in both classes of cases; for it is well settled that an action against a carrier cannot be maintained where the plaintiff’s negligence caused, or directly contributed to, the loss or injury. Upon this theory, and assuming to the fullest extent the *prima facie* liability of the innkeeper, by reason of the loss, the court said to the jury: ‘The only question for your consideration is, whether the plaintiff’s own negligence caused, or directly contributed to, the loss of the property.’

* * *

“The essential question, then, between the parties is, what, on the part of the guest, is ordinary care, or what may be attributed to him as negligence.

“It is claimed that the court erred in relation to this point, in two particulars: 1. In holding that the guest might be chargeable with negligence, in the care of his goods, in any case where they were not actually upon his person; 2. In holding that the innkeeper could, in any manner, limit his liability for the loss of the goods of his guest, except by contract with him.

“If the guest takes his goods into his own personal and exclusive control, and they are lost, while so held by him, through his own neglect, it would not be reasonable or just to hold another responsible for them. This is conceded to be true as to the clothes on the person of the guest, but is denied as

to property otherwise held by him. There is no good reason for the distinction; for the exemption of the innkeeper from liability is based upon the idea that the property is not held as that of a guest, subject to the care of the innkeeper, but upon the responsibility of the guest alone; and, therefore, it makes no difference, in principle, whether it is on his person or otherwise equally under his exclusive control. But this must be an exclusive custody and control of the guest, and must not be held under the supervision and care of the innkeeper, as where the goods are kept in the room assigned to the guest, or other proper depository in the house.

“The public good requires that the property of travelers at hotels should be protected from loss; and, for that reason, innkeepers are held responsible for its safety. To enable the innkeeper to discharge his duty, and to secure the property of the traveler from loss, while in a house ever open to the public, it may, in many instances, become absolutely necessary for him to provide special means, and to make necessary regulations and requirements to be observed by the guest, to secure the safety of his property. When such means and requirements are reasonable and proper for that purpose, and they are brought to the knowledge of the guest, with the information that, if not observed by him, the innkeeper will not be responsible, ordinary prudence, the interest of both parties, and public policy, would require of the guest a compliance therewith; and if he should fail to do so, and his goods are lost, solely for that reason, he would justly and properly be chargeable with negligence. To hold otherwise, would subject a party without fault to the payment of damages to a party for loss occasioned by his own negligence, and would be carrying the liability of innkeepers to an unreasonable extent. Story’s Bail., secs. 472 and 483; Ashill v. Wright, 6 El. &

Bl. 890; *Purvis v. Coleman*, 21 N.Y. 111; and *Berkshier Woolen Co. v. Proctor*, 7 Cush. 417.

“Nor does the rule thus indicated militate against the well established rule in relation to the inability of carriers to limit their liability; for it rests upon the necessity that, under different circumstances of the case, requires the guest to exercise reasonable prudence and care for the safety of his property.

“In connection with the two foregoing propositions, the correctness of the holding of the court below, as stated in the seventh paragraph of the charge, is questioned. Without repeating that paragraph here it is only necessary to say that upon the hypothesis there stated, the guest, by what he did and neglected to do, would directly contribute to the loss of his property. The charge was, therefore, right.

* * *

The following is an excerpt from *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560, 561:

“The guest is not relieved from all responsibility in respect to his goods on entering an inn; he is bound to use reasonable care and prudence in respect to their safety so as not to expose them to unnecessary danger of loss. Whether the plaintiff was so careless, in laying down his gloves in the manner he did, as to exonerate the innkeeper is a question of fact to be determined by the jury, in view of all the circumstances. What would be regarded as gross carelessness under one set of circumstances might not be so considered under other circumstances; much would depend upon the place, the number of people present, *the kind of property as to its value, and the ease with which it might be removed without detection, etc.*” (emphasis supplied)

Surely, a reasonable and prudent person, with Mrs. Corrigan’s knowledge, would not, under the circum-

stances, have behaved as lightly and unconcernedly as she did with an \$8,000.00 to \$10,000.00 mink coat even if it were insured for \$7,000.00, and the fact of insurance certainly does not reduce the standard of conduct required of Mrs. Corrigan with respect to defendant even though negligence was not a defense to her claim against her co-plaintiff insurer. Neither she nor her insurer should be permitted to charge defendant for her neglect.

As indicated above, Mrs. Corrigan was not relieved of all responsibility for her coat. Such is the import of the Arizona statute, *supra*, and such is the general rule at common law. 43 C.J.S. pp 1155-1156, *Innkeepers*, Sec. 14.

(b) *Answer to Remainder of Appellants' Argument.* Plaintiff's argument under sub-headings 3 to 5 of Argument in their opening brief is answered in one section because, as will appear, none of it is in point. Plaintiffs' argument under their sub-heading 6, concerning custom, has been referred to above and will be further answered in defendant's conclusion.

Plaintiffs first argue that defendant cannot limit its statutory liability by posting in the powder room a notice reading, "Not Responsible For Articles Left Here". *Apparently plaintiffs miss the true import of this notice, which is that Mrs. Corrigan was warned about the impropriety of leaving articles in the powder room and in the face of the warning left her coat there, not only during the dinner but throughout the whole evening, with full knowledge of the danger involved and in the face of the hotel's advice not to do so.*

In support of their argument plaintiffs cite *Maxwell Operating Co. v. Harper*, 138 Tenn. 640, 200 S.W. 515.

This case may be related to plaintiffs' proposition, but clearly has no application here, involving, as it does, a situation where *the guest delivered his coat to an employee of the hotel and received a numbered receipt or check on which the hotel attempted to avoid liability if its employee did not return the coat*. Mrs. Corrigan did not even *tell* any hotel employee what she had done with her valuable coat, much less deliver it to an employee and receive a check. Also, in *Maxwell etc. v. Harper*, *supra*, the guest was *directed* by the hotel to check his coat.

Plaintiffs next argue that defendant could not limit its statutory liability by an *oral* warning to Mrs. Corrigan that the powder room was an improper place to leave an expensive fur. Once again the point is *not* a limitation of statutory liability but an additional circumstance indicating Mrs. Corrigan was negligent: *she had been warned that the powder room was unsafe but left her coat there any way*.

Plaintiffs differ with the standard of care fixed by defendant's hostess, Mrs. Hicks, in her warning to Mrs. Corrigan regarding the safeguarding of valuable furs; but a reasonably prudent person as a matter of course would adopt this standard.

Plaintiffs then argue that Mrs. Corrigan was under no *duty* to inform defendant that she was leaving her coat in the powder room because the hotel knew that *some* (not all, as plaintiffs imply) guests often did so. In support of this is cited *Swanner v. Conner Hotel Company*, *supra*, which, as pointed out above, was a case where the guest did with his bag what *the hotel itself* customarily did with it, that is to say, he placed his bag at the bellboy station which he had learned was

the place where the *hotel* placed bags and took care of them while guests were registering.

Defendant might concede that Mrs. Corrigan was under no *duty* to inform defendant that she was leaving her coat in the ladies' room but had she done so it might have indicated some care on her part for the safety of her coat. Of course she had no *duty* to tell defendant if she left her coat on the knob of the front door of the hotel. The fact that on previous occasions she had left her coat in the powder room and had been warned orally and by the sign that it was unsafe to do so can not be utilized by the plaintiffs as evidence that defendant knew the coat was there on the night in question. Defendant was not forced to presume that Mrs. Corrigan would have so little regard for an \$8,000.00 coat.

III. *Conclusion.*

In support of their assertion that the conduct required of guests is different in an expensive hotel plaintiffs cite *Burton v. Drake Hotel Company*, 237 Ill. App. 76, a case entirely different from this one. In the *Burton* case the plaintiff, a wealthy man, *delivered his bags to an employee of the hotel and received checks for them.* The bags were lost and were not returned to the guest when he presented his checks. The defendant hotel suggested the guest had been negligent in not disclosing to the employee to whom he delivered his bags that the contents were valued at \$2,000.00. The court held that the value was not unusual for the type of guests to which the hotel catered.

Mrs. Corrigan, unfortunately, did not deliver her coat to an employee of defendant for safekeeping, but chose instead to leave it in the ladies' room in the public part of the hotel.

Plaintiffs also cite, on the question of custom, *Keith v. Atkinson*, 48 Colo. 480, 111 Pac. 55. The case is not in point at all. It involved loss of a guest's baggage, the checks for which he gave to a bellboy with instructions to give the checks to the clerk in order that the baggage could be obtained from the railroad by the hotel. Neither the checks nor the baggage were ever recovered by the guest. The court held that if it was the general custom among hotels generally that baggage checks were given to a bellboy, as this guest did, the guest was entitled to recover.

Plaintiffs of course offered no evidence and, so far, have not contended that it is the general custom among hotels, of either the commercial or the resort type, that ladies' \$8,000.00 furs are left in the ladies' room in the public part of the hotel.

It is true that some or a few of the guests at the San Marcos on occasions left wraps in the powder room, sometimes in the record called the ladies' room, but as pointed out above this was not the general custom and the hotel notified its guests that the powder room was an unsafe place for wraps.

Plaintiffs seem to obtain comfort from Mrs. Corrigan's testimony that there were approximately 200 coats in the powder room when she and her friend left their coats there. This testimony appears to be clearly erroneous in the light of the physical facts that the powder room is only 15 feet by 20 feet in size (Tr. 50, 95) and the only coat rack in the room is only 84 inches long. (Tr. 37, 95) There obviously could not have been 200 coats in the powder room, and Mrs. Corrigan's approximation is far from correct.

Plaintiffs assert that if Mrs. Corrigan was negligent other people also were negligent. This is not careful thinking and obviously is reasoning in a circle. Also, it does not appear in the record that any other person left an \$8,000.00 coat in the powder room for the length of time Mrs. Corrigan did without noticing coats taken out, at the same time possessing Mrs. Corrigan's knowledge, and having so little regard for the safety of her property.

It cannot logically be said, just because Mrs. Corrigan was accustomed to valuable furs and jewelry, and was not too concerned for their safety, and knew they were insured in any event, and because some of the other guests were in the same position and frame of mind, and all were willing to assume an obvious great risk which would appall a reasonably prudent person, that if one was negligent they all were and therefore none of them were negligent.

The type and value of property insured by Mr. and Mrs. Corrigan would indicate that they are people of substantial means, and perhaps a loss of valuable property means less to them than to most of us because, with their resources, it can be replaced easily. If because of this, and also because of the existence of an insurance policy covering the property, they were negligent and their property was thereby lost, that is certainly no basis for imposing liability upon the defendant. On the other hand, Mr. and Mrs. Corrigan, having been negligent and as a result having lost valuable property, are required to stand the loss themselves. They cannot recover from defendant for a loss occasioned by Mrs. Corrigan's negligence. Nor can their paid insurer.

The test to be applied is that of the reasonably prudent man in view of all the circumstances, including the value of the coat, where it was left, Mrs. Corrigan's special knowledge, the warnings given her and all of the other factors. The trial court, whose function it is so to do, considered all of the evidence and found the facts to be that a reasonably prudent man would not have acted as Mrs. Corrigan did, and that the loss would not have occurred if she had exercised ordinary care.

It is respectfully urged that not only was the trial court's finding of negligence *not* clearly erroneous, but that any contrary finding *would* have been erroneous, and that the trial court's finding is correct and should be sustained.

For the reasons above stated, defendant submits that the judgment should be affirmed.

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